TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 246.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY D. CODY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MARCH 20, 1895.

(15,837.)

(16,847.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 9, 1896.

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1 UNITED STATES OF AMERICA, }
Fifth Judicial District. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, on the third Monday of November, A. D. 1893, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Honorable John Bruce, United States district judge for the northern and middle districts of Alabama, and the Honorable Harry T. Toulmin, United States district judge for the southern district of Alabama.

THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error, }
v. }
HENRY D. CODY, Plaintiff in Error. }

Be it remembered that heretofore, to wit, on the 13th day of July, 1894, an order was filed in the office of the clerk of said United States circuit court of appeals in the words and figures following, to wit:

2 *Order Enlarging Time.*

(Filed July 13, 1894.)

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
vs. }
H. D. CODY, Defendant in Error. }

For good cause made known to the court, it is hereby ordered that the plaintiff in error herein shall have thirty days after the return day of the writ of error herein in which to file the record in this cause in the United States circuit court of appeals, at New Orleans, this July 10, 1894.

(Signed) JOHN B. RECTOR,
U. S. Dist. Judge.

Endorsed: Filed July 13, 1894. J. M. McKee, clerk.

And afterwards, to wit, on the 1st day of August, 1894, a transcript of the record of the above-styled cause in the circuit court of the United States for the northern district of Texas was filed in the office of the clerk of said court in the words and figures following, to wit:

3 *Caption.*

Be it remembered, that at a term of the circuit court of the United States in the fifth circuit thereof and in and for the northern district of Texas, at Dallas, begun and holden at Dallas, Texas, on

the 21st day of May, A. D. 1894, and which said court is now in session, the Hon. John B. Rector, United States district judge for the northern district of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to wit:

HENRY D. CODY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 1563.

Transcript from State court. Filed January 9, 1893.

Caption.

THE STATE OF TEXAS, }
County of Tarrant. }

Transcript of the record from the district court of Tarrant county, Texas (48th judicial district), to the United States circuit court for the northern district of Texas, at Dallas, Texas.

HENRY D. CODY
vs.
TEXAS & PACIFIC R'Y CO. } 7033, 7033.

Plaintiff's Original Petition.

Filed April 20, 1892.

STATE OF TEXAS, }
Tarrant County. }

In the District Court of Tarrant County, Texas.

To the honorable judge of said court:

The petition of Henry D. Cody, plaintiff, who resides in Tarrant county, Texas, complaining of The Texas and Pacific Railway
4 Company, a private corporation, created and existing under the laws of the State of Texas, hereinafter styled defendant, shows, that the defendant own- and operates a line of railway extending into and running through said Tarrant county, and into and through the city of Fort Worth, Tarrant county, Texas, and have for the purpose of conducting and carrying on its business in the management and operation of said line of railway an office and agency and an agent and representative in the city of Fort Worth, in said Tarrant county, upon whom citation may be served in this case, the name of the said agent being J. T. Clements.

Plaintiff avers and charges that heretofore, to wit, on the 4th day of March, A. D. 1892, defendant by and through its agents and servants, was engaged in running its cars and engines, propelled by steam, for the transportation of freight and passengers, on and over its said line of railway into and from the city of Fort Worth, Texas, passing and crossing over a street in the city of Fort Worth and within the corporate limits of same, called Jennings avenue; and while defendant was so engaged by and through its agents and

servants, did on said day, carelessly and negligently conduct, manage and operate and propel, one of its said engines and cars attached thereto, that the same by reason and on account of, by and through the negligence and carelessness of its said agents and servants, and at a point on defendant's said line of railway, near to, about, at and on the place where the track of said defendant's railway crosses and passes over the said Jennings avenue, in the city of Fort Worth, Tarrant county, Texas, as aforesaid, run against and upon plaintiff, knocked plaintiff down injuring and bruising the body of plaintiff, and especially the rear part of the head and run over one of plaintiff's limbs, to wit: his right leg, without fault or negligence on the part of plaintiff, thereby wounding and bruising and lacerating the body, head and limbs, and crushing and mangling one of
5 plaintiff's lower limbs, to wit: his right leg, and by reason and on account whereof, plaintiff says that his right leg was so badly crushed and mangled that it was necessary for plaintiff to have his said leg amputated, and that on account of said injury as aforesaid occasioned, plaintiff's said leg was, on to wit: about the 5th day of March, 1892, amputated and taken off.

Plaintiff says further: that by reason and on account of having been as aforesaid, run against and knocked down, and run over by said engine and cars, by and through the negligence and carelessness of the agents and servants of defendant, he, plaintiff, laid hurt, mangled and wounded for a great length of time, undergoing medical and surgical treatment for his said injuries, to wit: for a period of sixty days next following the time when said injuries *was* inflicted, and during all said time plaintiff suffered great and excruciating bodily pain and agony, and during said time was confined to his said house and bed and enduring said suffering.

Plaintiff says further by reason of said amputation of his said leg, which said leg was amputated just above the knee, he suffered additional great bodily pain and great mental anguish on account of his being so greatly disfigured and permanently injured, crippled and maimed and disabled.

Plaintiff further says that during the time he was being treated for his said injuries and prostration, and confined to his bed and house, it became and was necessary for him to have constant assistance and waiting upon and caring for plaintiff, the same being in value of to wit: $200.00. And that during said time plaintiff underwent constant medical treatment to the costs and expense to plaintiff, and for which plaintiff is liable to pay of to wit: $500.00; that during said time plaintiff had supplied and furnished to him drugs and medicines, for the payment of which plaintiff is liable, of the value of to wit: $100.00.

And plaintiff says further that during said time and from
6 said time of said injury to and including said time, he has been rendered, by said injury, unable to work or earn a livelihood, and that his services during said time are of the value of to wit: $60.00 per month.

And plaintiff says further that on account of his said injuries he has been rendered and is permanently disabled, maimed and

crippled; and his ability to earn a livelihood has thereby been greatly lessened and made more difficult; by reason whereof plaintiff says that he has been damaged in the sum of to wit: $10,000.00.

Plaintiff says further that by reason of said mangling and physical suffering, occasioned by said injury, he has been greatly damaged in the further sum of to wit: $10,000; and plaintiff says that by reason of the premises that he has been injured and greatly damaged by the defendant and has been damaged in the aggregate sum of actual damages, to wit: $20,000.00.

Wherefore, plaintiff prays that defendant be cited to appear and answer as the law directs, and that upon final hearing hereof he have judgment for his costs in this behalf of the court, and for his said damages and general relief. And as in duty bound will ever pray.

FIELD, WEST & SMITH,
Attorneys for Plaintiff.

Filed April 20th, 1892.

L. R. TAYLOR,
District Clerk.

Original Answer of Defendant.

Filed May 10, 1892.

HENRY D. CODY
vs.
T. & P. R'Y Co. } No. 7033. In District Court, Tarrant County, May Term, 1892.

Now comes the defendant in the above entitled and numbered cause and demurs to the petition of the plaintiff therein filed, and says that the same is insufficient in law and shows no cause of action against it and of this it prays the judgment of the court.

7

FINCH & THOMPSON,
Attorneys for Defendant.

And further answering in this behalf defendant denies all and singular the allegations in plaintiff's petition, and demands strict proof of the same.

FINCH & THOMPSON,
Attorneys for Defendant.

Filed May 10, 1892.

L. R. TAYLOR,
District Clerk.

Petition for Removal to Circuit Court.

Filed May 10, 1892.

Petition for Removal to the Circuit Court of the United States for the Northern District of Texas.

H. D. CODY, Plaintiff,
vs.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant.

In the District Court of Tarrant County, State of Texas.

To said district court:

Your petitioner, The Texas & Pacific Railway Company respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit, exclusive of costs and interest, exceeds the sum of two thousand dollars ($2,000.00); that at the commencement of this suit plaintiff was then and still is a citizen and resident of the State of Texas, and that your petitioner was then and still is a corporation organized under and by virtue of certain acts of Congress of the United States, to wit: an act entitled

8 "An act to incorporate the Texas and Pacific Railway Company and to aid in the construction of its road and other purposes," approved March 3rd, 1871; and an act supplementary thereto approved March 2nd, 1872; and that this is a suit arising under the laws of the United States within the meaning of the 2nd section of an act of March 3rd, 1875, as amended by the acts of March 3rd, 1887, and August 13th, 1888.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in the said circuit court of the United States on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And it prays this honorable court to proceed no further herein except to make the order of removal required by law, and accept the said surety and bond and to cause the record herein to be removed into the said circuit court of the United States in and for the northern district of Texas, and it will ever pray.

FINCH & THOMPSON,
Attorneys for Petitioner.

Filed May 10th, 1892.

L. R. TAYLOR,
District Clerk.

Bond for Removal.

Filed May 10, 1892.

Know all men by these presents, that we, The Texas & Pacific Railway Company as principal, and —— —— and —— —— as

sureties, are held and firmly bound unto H. D. Cody, in the penal sum of five hundred dollars ($500.00), — the payment whereof well and truly to be made unto the said H. D. Cody, his heirs and assigns, we bind ourselves, our heirs and legal representatives and assigns jointly and severally firmly by these presents:

Yet, upon these conditions: That the Texas and Pacific
9 Railway Company having petitioned the district court of Tarrant county, State of Texas, for the removal of a certain cause therein pending wherein H. D. Cody is plaintiff and The Texas & Pacific Railway Company is defendant, to the circuit court of the United States in and for the northern district of Texas:

Now, if the said Texas and Pacific Railway Company shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that shall be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness, our hands and seals this the 9th day of May, 1892.

THE TEXAS & PACIFIC RAILWAY CO.,
By FINCH & THOMPSON.

W. G. TURNER.
MAX ELSER.

Approved May 10th, 1892.

L. R. TAYLOR,
District Clerk.

Filed May 10th, 1892.

L. R. TAYLOR,
District Clerk.

Order of Removal.

Entered June 6, 1892.

HENRY D. CODY
vs.
TEX. & PAC. R'Y CO. } 7033. Motion for Removal Granted, June 6th, 1892.

This day came on to be heard defendant's motion for removal of this cause to the United States circuit court for the northern district of Texas, and the defendant having made and filed with the papers in this cause, its bond with good and sufficient surety as required by law; it is therefore ordered by the court that said motion be granted and that this cause be and the same is hereby removed to the United States circuit court for the northern district of Texas, at Dallas, Texas.

10 *Statement of Costs.*

Plaintiff's costs	$4 85
Defendant's costs	12 90
Total costs	$17 75

Certificate.

THE STATE OF TEXAS, }
County of Tarrant. }

I, R. H. McNatt, clerk of the district court of Tarrant county, Texas, do hereby certify that the above and foregoing transcript is a true and correct copy of all the proceedings had in said cause No. 7033, Henry D. Cody *vs.* Texas & Pacific Railway Company, as the same appears of record and on file in my said office.

Given under my hand and seal of said court at office in the city of Fort Worth, Texas, this the 8th day of December, A. D. 1892.

R. H. McNATT,

[SEAL.] *Clerk District Court, Tarrant County, Texas.*

The foregoing has the following endorsement, to wit:

No. 1563. Henry D. Cody *vs.* Tex. & Pac. R'y Co. Transcript to U. S. circuit court northern district of Texas, from district court Tarrant county. Filed Jan'y 9, 1893. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

Plaintiff's First Amended Original Petition.

STATE OF TEXAS, }
County of Dallas. }

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, January Term, A. D. 1893.

HENRY D. CODY }
vs. }
TEXAS & PACIFIC RAILWAY CO. }

To the honorable the judge of said court:

The petition of Henry D. Cody, plaintiff, who resides in
11 Tarrant county, Texas, complaining of The Texas & Pacific Railway Company, a private corporation, created and existing under the laws of the State of Texas, hereinafter styled defendant, shows:

The defendant owns and operates a line of railway extending into and running through the city of Fort Worth, Tarrant county, Texas, and have for the purpose of conducting and carrying on its business in the management and operation of said line of railway, an office and agency and an agent and representative in the city of Fort Worth, in said Tarrant county, upon whom citation may be served in this case, the name of said agent being J. T. Clements.

Plaintiff avers and charges that heretofore, to wit: on the 4th day of March, A. D. 1892, defendant, by and through its agents and servants, was engaged in running its cars and engines, propelled by steam, for the transportation of freight and passengers on and over its said line of railway into and from the city of Fort Worth,

Texas, passing and crossing over a street in the city of Fort Worth and within the corporate limits of same, called "Jennings avenue;" the same being then and there a public thoroughfare and crossing within the corporate limits of said city; and that, while defendant was so engaged, by and through its agents and servants, did on said day, carelessly and negligently conduct, manage and operate and propel one of its said engines and cars attached thereto, and the same by reason and on account of and by and through the negligence and carelessness of its said agents and servants, and at a point on defendant's said line of railway near to, about, at and on the place where the track of said defendant's railway crosses and passes over the said Jennings avenue, in the city of Fort Worth, Tarrant county, Texas, as aforesaid, run against and upon plaintiff and knocked plaintiff down, injuring and bruising the body of plaintiff and especially the rear part of his head, and did run over one of plaintiff's limbs, to wit: his right leg, and without
12 fault or negligence on the part of plaintiff, thereby wounding, bruising and lacerating his body, head, and limbs and crushing and mangling one of plaintiff's lower limbs, to wit: his right leg, and by reason and on account whereof, plaintiff says that his right leg was so badly crushed and mangled that it was necessary for plaintiff to have said leg amputated, and that on account of said injury, so as aforesaid occasioned, plaintiff's said leg was, on to wit: about the 5th day of March, 1892, amputated and taken off.

Plaintiff further avers and charges that heretofore, to wit: on or about the 4th day of March, A. D. 1892, defendant, by and through its agents and servants was engaged in running its cars and engine, propelled by steam for the transportation of freight and passengers on and over its said line of railway into and from the city of Fort Worth, Tarrant county, Texas, the same being then and there a legally incorporated city, in the State of Texas, of more than ten thousand inhabitants, the line of said defendant's railway passing and crossing over a street in the city of Fort Worth, Tarrant county, Texas, and within the corporate limits of same, called "Jennings avenue," the same being a public street and crossing in the corporate limits of said city; and that while defendant was so engaged by and through its agents, servants and employés, in operating, running and propelling its said engine and cars, did, at said point on said railway near to, at and on the place where defendant's said track crosses the said Jennings avenue on the said 4th of March, 1892, the same being night-time and very dark, carelessly and negligently run its said engine and cars at a greater rate of speed than six miles per hour, which is the rate of speed allowed for the running of trains within the corporate limits by ordinance of the city of Fort Worth, Tarrant county, Texas, and the defendant and its said agents, servants and employés, did then and there carelessly and negligently fail to ring the bell on its said engine, and carelessly and negligently fail to blow the whistle attached to said engine,
13 and did then and there fail to have and carry on the end of

its said cars approaching [illegible] as it is required to do under the laws of this State, and in order to protect human life, and did then and there fail to have at said crossing, over said Jennings avenue any light, or lights, provided at said crossing for the convenience and safety of the public in using the same, as is required by the ordinance of the city of Fort Worth, Tarrant county, Texas, and the said defendant, its agents, employés, and servants, did then and there negligently fail and refuse to provide and have, at said crossing on Jennings avenue, and on said cars then and there operated, run and propelled by defendant, as aforesaid, any flagman, guard or watchman as it was their duty to do, and as a prudent person would have done under the like circumstances and conditions, did then and there under the circumstances as aforesaid, carelessly and negligently run, propel and back its car against, upon and on plaintiff, and did then and there without any fault or negligence on his part, knock plaintiff down, and injure and bruise his body, and especially the rear part of his head, and did run over one of plaintiff's legs, to wit: his right leg, without fault or negligence on the part of plaintiff, thereby wounding, bruising and lacerating his body, head and limbs and did crush and mangle one of plaintiff's lower limbs, to wit: his right leg, and by reason and on account whereof plaintiff says that his right leg was so badly crus-ed and mangled that it was necessary for plaintiff to have said leg amputated and, on account of said injury, so as aforesaid occasioned, plaintiff's said leg was on, to wit: about the 5th of March, 1892, amputated and taken off.

Plaintiff says further that, by reason of and on account of having been as aforesaid, run against, knocked down and run over by said engine and cars, by and through the negligence and carelessness of defendant and its agents and servants, as is hereinbefore set out, and without any fault or negligence on the part of this plain-
14 tiff, he, plaintiff, was hurt, mangled, and wounded for a great length of time, undergoing medical and surgical treatment for his said injuries, to wit: for a period of 60 days next following the time when said injury was inflicted, and during all said time plaintiff suffered great and excruciating bodily pain and mental anguish and agony, and during said time was confined to his said house and bed and endured said suffering.

Plaintiff says further, by reason of said amputation of his said leg, which said leg was amputated just above the knee, he suffered additional great bodily pain and great mental anguish and pain on account of his being so greatly disfigured and permanently injured, crippled, maimed and disabled.

Plaintiff further says, that during the period he was being treated for his said injuries, and while he was prostrated and confined to his said bed and house it was necessary for him to have constant assistance, attendance and waiting on and caring for, and in order to procure the same, plaintiff was compelled to secure a place to board and lodge at and to have such attendance and service as his condition required, at a great cost and expense to him, to wit: the sum of $200.00; that of this sum he was compelled to become liable

to pay $100.00 for a lodging place suitable to his condition, and of said sum of $200.00 he was compelled to become liable to pay the further sum of $100.00 for his waiting on, and for such service to him as his condition required; that the said sums of money, to wit: the sum of $100.00 for his said lodging and $100.00 for attendance, etc., were and are reasonable, and no more than said lodging and attention is reasonably worth, and that on account of his said injuries, plaintiff was compelled to employ a physician to attend on him continuously during the time of his illness as aforesaid, and that said physician attended on him continuously during the time of his said illness as aforesaid, and that said physician attended on him for a period of more than 100 days, and the service of said physician for the services rendered pl't'ff by him, for and during said time, was reasonably worth the sum of $500.00; and that plaintiff promised, agreed, undertook and became liable to pay the said sum of $500.00 to his said physician.

And plaintiff says further that during said time, and from said time of said injury to and including said time he has been rendered by said injury unable to work or earn a livelihood, and that his services during said time are of the value of to wit: $60.00 per month. And plaintiff says further that on account of said injuries he has been rendered and is permanently disabled, maimed and crippled, and his ability to earn a livelihood is thereby greatly lessened and made more difficult, by reason whereof, plaintiff says that he has been damaged in the sum of to wit: $10,000.00.

Plaintiff says further that by reason of said mangling and physical suffering occasioned by said injury he has been greatly damaged in the further sum of to wit: $10,000.00. And plaintiff says by reason of the premises that he has been injured and greatly damaged by the defendant, and has been damaged in the aggregate sum of to wit: $20,000.00.

Wherefore, plaintiff prays that defendant be cited to appear and answer as the law directs, and that upon final hearing hereof he have judgment for his cost in this behalf of the court, and for his said damage and general relief.

And as in duty bound will ever pray, etc.

FIELD, WEST & SMITH,
Att'ys for Plaintiff.

The foregoing has the following endorsement, to wit:

No. 1563. Henry D. Cody *vs.* Texas & Pacific R'y Co. First amended original petition of plaintiff. Filed Jan'y 26, 1893. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

16 *Defendant's First Amended Original Answer.*

Filed June 22, 1893.

H. D. CODY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas.

Now comes the defendant and by leave of court files this its first amended original answer, amending its original answer filed herein on the 10th day of May, 1892, as follows:

Defendant says that plaintiff's amended original petition filed herein on the 26th day of January, 1893, is insufficient in law, and of this it prays the judgment of the court.

Specially excepting to said petition defendant says that so much thereof contained in the first count, as charges that defendant by the negligence and carelessness of its agents and servants, and at a point on defendant's line of railway near to, about, at and on the place where the track of defendant's railway crosses and passes over Jennings avenue in the city of Fort Worth, Tarrant county, Texas, ran its engine and cars against and upon plaintiff, and knocked him down and inflicted the injuries which he claims to have sustained, is legally insufficient, because it does not specify whether said engine and cars so ran against and upon plaintiff near to, at or on said crossing, and because thereof it fails to apprise defendant whether it is required to meet a complaint of injuries inflicted on a crossing or away from a crossing. And of this defendant prays the judgment of the court.

For plea to said petition, defendant denies all and singular the allegations therein contained, and demands strict proof thereof. And of this it puts itself upon the country.

17 For special plea to said petition defendant says that plaintiff ought not to have and recover herein, for that if plaintiff was injured in the manner and form as he has averred, it resulted solely from his own negligence by trespassing upon defendant's railway at a place devoted exclusively to its own private use in conducting its business, and at which it owed him no duty of active care, and by exposing himself to danger of being run over by defendant's engines and cars, using said railway at said place when a man of ordinary prudence would not under the circumstances have so trespassed and exposed himself to danger, defendant's agents and servants engaged at the time in operating the engine and cars that ran over plaintiff, not knowing at the time and not then having any reason to expect his presence at said place. And this, defendant is ready to verify.

For further special plea to said petition, defendant says that plaintiff ought not to have and recover herein, for that if he was injured

as he has alleged, it resulted solely from his own negligence in attempting to cross the defendant's railway without looking and listening for defendant's engine and cars, and without exercising the care that a man of ordinary prudence would have used under the circumstances to protect himself from being run over by defendant's engine and cars. And this defendant is ready to verify.

For further plea to said petition, defendant says that plaintiff ought not to have and recover for this, that if he was injured as he has alleged and if defendant was negligent, as he has alleged, still he, himself, failed to exercise the care that a man of ordinary prudence would have used under the circumstances, by attempting to cross defendant's railway and omitting to look and listen for said engine and cars, and that but for such want of care on his part he would not have been hurt. And this defendant is ready to verify.

For further plea to said petition, defendant says that plaintiff ought not to recover herein, because even if he was injured
18 and defendant was negligent, as he has alleged, still he failed to exercise the care that a man of ordinary prudence would have used under the circumstances, by attempting to cross defendant's railway when its servants in charge of its engine and cars were ringing the bell and blowing the whistle, and the running of the train itself made a loud noise, so that plaintiff heard or ought to have heard said noises, and a bright light was shining and defendant's servants were displaying lights so as to render said engine and cars plainly visible to plaintiff; and when he knew, or by the exercise of his senses of hearing and seeing, he ought to have known of the fact that said train was approaching and liable to run over him if he attempted to cross said railway, at the time and place at which he made the attempt; and that but for such want of care upon his part, he would not have been hurt. And this defendant is ready to verify.

STEDMAN & THOMPSON,
Attorneys for Defendant.

The foregoing has the following endorsement, to wit:
H. D. Cody *vs.* Texas & Pacific Railway Company. Defendant's first amended original answer. Filed June 22, 1893. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

Judgment.

From the minutes of the circuit court of the United States for the northern district of Texas, at Dallas, May term, 1894.

HENRY D. CODY
vs. } 1563.
TEXAS & PACIFIC R'Y CO.

MAY 30, 1894.

On May 28, 1894, this cause was regularly called for trial and came the parties, plaintiff and defendant, by their respective attor-

neys and announced ready, and then came on to be heard the exceptions of the defendant to the amended petition of the plaintiff filed herein and the court having heard and considered said
19 exceptions is of the opinion that they are not well taken and they are overruled; then came a jury of twelve good and lawful men, to wit:

J. H. Ellis,	N. B. Miller,	P. A. Chapman,
Wm. Martin,	W. E. Edens,	A. W. Washington,
J. W. McDougal.	D. H. Fry,	James Rogers,
H. A. Dunn,	J. B. Smith, and	G. O. Dent,

who were duly and legally selected, empanelled and sworn to try this cause and the trial proceeded until May 29, 1894, when J. H. Ellis being unable to longer serve as a juror in this case, by consent of both parties was excused and the trial proceeded with the eleven remaining jurors, and the said eleven remaining jurors having heard the pleadings, evidence, argument of counsel and charge of the court, retired to consider of their verdict, and thereafter on May 30, 1894, returned into open court the following verdict, to wit:

"We the jury find for the plaintiff and assess his damages at seven thousand and five hundred dollars ($7,500.00.)

J. W. McDougal,	N. B. Miller,	D. H. Fry,
G. O. Dent,	H. A. Dunn,	J. B. Smith,
W. E. Edens,	A. W. Washington,	Jas. W. Rogers,

and W. L. Martin, foreman."

It is therefore considered by the court and it is so ordered and adjudged that the plaintiff, Henry D. Cody, do have and recover of and from the defendant, The Texas & Pacific Railway Company, the sum of seven thousand and five hundred ($7,500.00) dollars with interest thereon from this date at the rate of six per centum per annum, together with all costs by him herein incurred and expended and for which execution may issue.

It is further ordered that execution issue in favor of the officers of court, notaries and witnesses for the costs by plaintiff and defendant herein respectively incurred, against said plaintiff and defendant.

20 *Defendant's Motion for New Trial.*

Filed May 31, 1894.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

H. D. CODY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendant and moves the court to set aside the verdict and judgment herein and grant it a new trial of this cause, for the following reasons:

1. Because the court erred in refusing special charge No. 1, asked by defendant.

2. Because the court erred in refusing special charge No. 3, asked by defendant.

3. Because the court erred in refusing special charge No. 6, asked by defendant.

3½. Because the court erred in refusing special charge No. 7, asked by defendant.

4. Because the court erred in that part of its charge wherein it instructed the jury that it was the duty of defendant to keep the bell ringing or the whistle blowing until the crossing should be reached and passed for it imposed upon defendant a duty more onerous than the statute prescribes.

5. Because the court erred in that part of its charge wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and it presents the law too strongly in favor of the traveler whose duty it is upon approaching the crossing to be on the alert and not to stop and look and listen to ascertain whether if he ventures on the crossing his life or limbs may be imperiled by a train that may be nearing the crossing at the same time.

21 6. Because the charge of the court prescribed no measure of damages leaving the assessment of damages to the unbridled discretion of the jury.

7. Because the court erred in permitting the plaintiff to prove by the witness J. W. Judkins, over the objection of defendant, that the testimony presented a self-serving declaration of plaintiff and was immaterial and irrelevant, that, when after the accident he reached plaintiff, plaintiff informed him that he had been run over at Jennings Avenue crossing.

8. Because the court erred in refusing to allow the defendant to offer in evidence the book kept by witness Charles McCafferty and showing that there was no entry therein of the absence of a light at Jennings Avenue crossing on the night in question.

9. Because the verdict of the jury is contrary to the evidence in this, that plaintiff himself failed to establish that he looked and listened for a train on defendant's track at such distance from Jennings Avenue crossing as was reasonably necessary to enable him to discover the presence of a train on the track leading to the crossing.

10. Because the verdict of the jury is contrary to the evidence in this, that plaintiff proved by his own testimony that he was negligent in not stopping as he approached the crossing.

11. Because the verdict is contrary to the evidence in this, that a fair preponderance of the credible evidence in the case showed that plaintiff was not injured on the crossing but some distance therefrom.

12. Because the verdict is contrary to the evidence in this, that the reasonable preponderance of the credible evidence established that there was a bright light burning at the crossing when plaintiff

claims he was hurt, and that therefore he would have been aware of the presence of the train had he been as careful as he ought to have been under the circumstances.

22 13. Because the verdict of the jury is contrary to the evidence in this, that a fair preponderance of the evidence showed that the bell on the train was ringing as approaching the crossing and that hence if plaintiff had exercised ordinary care he would have known that the train was at the crossing when he ventured to cross the track.

14. Because the verdict is contrary to the evidence in this, that a fair preponderance of the evidence showed that a headlight was burning in the tank of the engine when it approached the crossing and that hence if plaintiff had used ordinary care he would have seen the train.

15. Because the verdict of the jury is contrary to the evidence in this, that a fair preponderance of the evidence showed that plaintiff was injured on account of his being in a state of intoxication.

16. Because the verdict is contrary to the charge of the court in this, that the evidence showed that before the accident plaintiff had contracted for an arc light at the crossing and that said light had been erected and had generally burned all right before the accident and since its erection and that said light was of sufficient illuminating capacity to light the crossing and render visible any cars that might be on the crossing or approaching it, and under these facts as applied to special charge No. 4 requested by defendant and given by the court, the jury were under the necessity, if they regarded such evidence and charge, to return a verdict in favor of defendant upon the issue as to defendant's duty respecting the lighting of the crossing; and the resolving of that issue for defendant would have necessitated a verdict in its favor.

17. Because the verdict of the jury is unjust in awarding to plaintiff excessive damages.

18. Because the verdict of the jury is contrary to the evidence which established that even if defendant was negligent *and*

23 that his negligence concurring with defendant's contributed proximately to the production of his injuries.

STEDMAN & THOMPSON,
Att'ys for Def't.

The foregoing has the following endorsement, to wit:

No. 1563. Henry D. Cody *vs.* Tex. & Pac. R'y Co. Defendant's motion for new trial. Filed May 31, 1894. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

Order Overruling Motion for New Trial.

From the minutes of the circuit court of the United States for the northern district of Texas, at Dallas, May term, 1894.

HENRY D. CODY
vs.
TEXAS & PACIFIC R'Y CO. } 1563.

JUNE 4, 1894.

On this day came on to be heard the motion of the defendant for a new trial herein and the court having heard and considered said motion and the argument of counsel thereon and being fully advised in the premises is of the opinion that said motion is not well taken, and it is ordered that said motion be and it is hereby overruled and refused; and it is further ordered that the defendant be and it is hereby allowed twenty-five days from this date within which time to prepare, submit and file its bills of exceptions herein.

Defendant's Bill of Exceptions.

Filed June 25, 1894.

H. D. CODY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

Be it remembered that on the trial of the above-entitled
24 cause the following facts were established by the evidence introduced:

H. D. CODY in his own behalf testified:

I reside now and have for two years resided at Fort Worth; previously I resided at Greeley, Colorado. My business for about eleven years has been handling, as well as breeding stallions and supervising men who helped in that line. I first came to Fort Worth on November 26th, 1891, bringing with me horses which I put in the "Kentucky stables," corner 8th and Calhoun streets. In the fore part of 1892, I was at said stable taking care of said horses.

On the night of March 4th, 1892, I was at said stables. I was round the barn talking with the employés and proprietor. I said to one of the men working there at a quarter of ten o'clock that night, "I am going up the street a little way and will be back in a short time and wish you would look after one of my horses and see that he is all right." I then started out across Rusk, Main and Houston streets leading right on into Jennings avenue and went over to the "South Side" to see a party who was not at home. I

immediately turned around and was coming back on the same side of the street I went over on, which was the east side of Jennings avenue (marked on stenographer's map thus: x x x x x). I walked very fast to get back, as I never allowed myself to be away from these horses any great length of time. I could hear no train but could see lights away ahead of me at the mill, and I knew I was at the power-house and that I was near the railroad. I heard no train; there was no electric light there at all, in fact no light at all. There was no whistle blown, because if there had been I should surely have heard it, neither was there any bell rung. I was on the eastern sidewalk, walking directly across the track where there would have been a sidewalk if it was not for the railroad, or the switch-stand; the stand is directly in the side of the crossing where the sidewalk should be. As I passed over this track (marked "A" on stenographer's map) I was struck and knocked down and felt my foot caught in some way at the same time. I was struck where switch-stand and track comes together. I could not say how many wheels ran over me or how many cars, but it knocked me down and tore this limb up and split the back of my head considerably. My next recollection was some of the men turned me over on my back and asked me who I was and where I belonged. I gave them my name and told them to take me to the Kentucky stable. There were some men with lights or lanterns around me, and they picked me up. I tried to get — and begged them to leave me where I was; they picked me up and carried me to some other place about thirty or forty feet east of where I was hurt right after I was hurt and laid me down again. I could not say who picked me up and moved me, but there were some railroad men and some other people there; I was picked up and moved to another place from that where I was hurt before I was picked up by the police wagon. I next saw an officer, whose brass buttons and badge I remember. They then picked me up again and put me in a wagon and took me to the Kentucky stable. This is my last knowledge until I came to my senses lying in a bed at the hospital with my leg off. When I was struck it was a very little past ten o'clock Friday night, March 4th, 1892. It was a dark night and the weather was almost rainy; it was damp with strong indications of rain. As to the weather, in approaching that road I listened for any noise of the railroad train I will say there is a noise men can hear all hours of the day and night. Cameron's mill is there and makes a terrible noise. The power-house on the same side of the street makes a terrible noise. Cameron's mill is here. (Witness points to place marked " B " on stenographer's map.) Cameron's mill is on the north side of the track and west of the street; the power-house is south of the track and on the west side of the street.

I wore a gray coat and vest and dark pants that night. The pants had a black stripe and a dark-brown stripe. I wore a light Stetson hat. I had bought the pants two days before the accident, the coat and vest I brought with me from Colorado some time before that. The clothes are destroyed or worn out before

this time; the pants are all destroyed. The hat was never seen after the accident to my knowledge. To the question, What did you do, if anything, while approaching the crossing of T. & P. R'y track over Jennings avenue in the city of Fort Worth, Texas, tell with reference to looking and listening; he answered, As I approached the crossing I will say, I did not come to a dead stop, but slacked my pace and walked slow and listened and looked and I heard no train and could see none. There was no light at the crossing. If there had been any light on the train that run over me I know I would have seen it, I am certain there was no light on the said train. The bell was not ringing nor was the whistle blown for the crossing by the parties on the engine which ran over me.

When I approached the crossing I knew where I was; the reason I say this, is, they have a switch-light there, which I think they use on the T. & P. I think it is a red and white light, which gives no light. That reflects no light on the surrounding ground or surface, to speak of; it is just red and white light used for a signal. The switch-light was on the south side of the track and I was approaching from the south side along the east side of the street. I was alone at the time. I saw no light on the train.

When I was injured March 4th, 1892, I was thirty-five years old and was working for sixty-five dollars per month, besides board and washing, the year round. This would make about ninety dollars per month.

I was confined in St. Joseph's infirmary in Fort Worth from March 4th to June 22nd. Dr. W. B. West attending me as physician,
27 and the sisters of the hospital nursed me. My bill to St. Joseph's infirmary is $150.00 or $160.00, which is reasonable.

I suffered from this injury all that mortal man could bear from both my leg and head; I was injured in the head, it was a gash, a kind of half circle, close to the crown, which left a scar about an inch and a half long; I knew it was pretty bad. The doctor took the hair away from it so they could operate on it and left it so they could *could* attend to it in case any bones were broken or the brain affected. I was bruised over the arm on the shoulder, where I was struck, a place about the size of a man's hand. My shoulder was black and blue, and the skin was all broken, and then my face was all peeled and skinned and scarred. There was a great big chunk knocked out of my face. I suffered terrible pain from this last injury, which lasted all day and night for days and days. Sometimes it would be all day and all night; sometimes it would bother me worse at night than daytime, but for a week or more, a little over, I was in continual pain, all through my system, through the leg, groin, back, shoulder and my head. I have occasion yet to call Dr. West for my suffering; I could not state the number of times since then. I have suffered with this leg and have had to have his service a great many times. Last week I was laid up about forty-eight hours with this leg, it seems like something was crushed in it.

Prior to March 4th, 1892, I was a healthy rugged man, had had no sickness since I was a boy. Since March 4th, 1892, my health

has been poor, pretty well destroyed; since March, 1892, I have been disabled and have done no work. I have had no means to work and have been compelled to be with my crutches in my hands and sick, and in the doctor's hands. I have not engaged in any business, nor is there any business I could do, or that I was able to do, as my health did not admit of my doing any.

28 Cross-examined H. D. CODY testified:

When I left the Kentucky stable on the night of March 4th, 1892, it was a quarter of ten o'clock, which I know from asking Mr. Young, the proprietor of the stable, the time and from his looking at his watch and telling me the time. From the stable I went across Rusk, one block, Main another, Houston another, then into Jennings avenue. That was the width of three blocks and three streets, the blocks being three hundred feet; I went across the railroad on Jennings avenue about two or three blocks south of the railroad crossing; I entered Jennings avenue about three hundred yards north of the railroad. I went to see a woman named Mary French, knocking at the door and receiving no response I turned back, I stayed at the house about one minute and a half before turning back. On returning I saw the switch-light, which was located about two or two and a half feet south of main track; it was a red light. It only threw a light to the west, but did not throw any to the north, the way I was going.

Cameron's mill was located about fifty feet northwest from where I was hurt and was running at the time. The power-house of the electric street railway company was located about fifty yards southwest from where I was hurt and it was running at the time. Both of them were making great noise, which I could hear distinctly at the time, when I was hurt.

The train that struck me had no light, because if there had been any I should have seen it. When I was struck I felt a blow on my foot and I was knocked down and my foot was caught. The next thing was when they turned me over to pick me up and asked me my name; the reaction had taken place then, I suppose. I could not say how long it was after I was struck before they picked me up. It is not a fact that when they picked me up instead of carrying me any distance they merely picked me up and put me on the cushion or pillow. I could not say how many men picked
29 me up. I know somebody had hold of my shoulders one place and somebody another, but I don't know how many. As to who picked me up the first time I do not know, but I have known them since then; they were there and picked me up but I did not know them at the time.

After I had been removed from the crossing I was picked up and placed in the patrol wagon in which I was conveyed to the stable. At the time I was placed in the wagon I observed the presence of Policeman Judkins, I did not see him before. When I got to the crossing I had on a light hat called a railroad hat. It was at the time very cloudy and dark. It was only a short time after I left the house on south side before I got to crossing. From the time I

left the Kentucky stable until, after having gone to the south side, on my return I reached the crossing it was probably half an hour. I would say I was hurt at a quarter past ten.

It was the corner of the car that struck me first, corner of the car, not the engine. I know it was a car, for if it had been an engine it would have a headlight. I did not see it when it came in contact with my body, if I had it would not have hit me. I concluded if it had been an engine it would have had a headlight. I am positive that it was a car and not an engine, because an engine could not strike me that high; the pilot beam coming on would strike a man lower than the shoulders. It was to be a car because the engine could not strike me that far upon the shoulders.

Upon redirect examination the witness CODY testified:

I had that night in my pockets a piece of tobacco and a knife, and I also had a bottle of tincture of aconite and a bottle of sweet spirits of nitre and a large tablespoon for use for horses; I never saw these things after being injured that night. I did not have any whiskey in pockets or about my person at all.

Dr. W. B. WEST, a witness for plaintiff, testified:

That he had been a practicing physician and surgeon for about eleven years, five years of the time in Fort Worth; that he had known plaintiff since January or February, 1892; that on the night of March 4th, 1892, at or about eleven o'clock he saw plaintiff at the Kentucky stables with his left leg badly crushed from some heavy object having run over it, the leg above the ankle having been mashed to a perfect jelly; that he tried to save plaintiff's leg, but the ligaments were badly torn and it had to be amputated above; that plaintiff was suffering a great deal from the nervous shock; that plaintiff had severe gash in the back of his head, three or four inches long, laid bare to the skull, the injury being rather to the left but backwards; that plaintiff had a bruise on his left shoulder; that plaintiff was in the hospital three or four months and that he has attended him ever since the accident; that before plaintiff was injured he was a very stout, muscular man and weighed thirty or forty pounds more than he had afterwards; that since being injured plaintiff has become very nervous, the least excitement upsetting him so much that witness has seen him almost in spasms from it, rendering it necessary for witness to several times inject morphine into him for nervous prostration; that it was a long while before the cut on the back of his head got well and he suffered great pain from it for four or five months and it caused concussion and shaking up; that the bruise on the shoulder was slight; that witness was then city physician and had charge of St. Joseph's infirmary; that the reasonable value of witness's services for attending plaintiff, amputating his leg, etc., was the sum of eight hundred dollars.

Cross-examined, witness Dr. W. B. WEST testified:

That he had attended plaintiff professionally before accident for a slight paralysis of the hand, caused from sleeping on it, a common

thing, two or three applications of electricity being sufficient to cure him; that plaintiff was not a nervous man before the accident; that witness was called to see plaintiff when he was injured, not as city physician, but in a private capacity.

31 E. E. MILLER, witness for plaintiff, testified:

That he was in March, 1892, and still is in the commission business at Fort Worth; that he had known Cody since November, 1891; that he remembers when Cody was hurt at Jennings Avenue crossing on the night of March 4th, 1892; that he saw him that night about an hour before he was hurt at the Kentucky stable, Mr. Young, proprietor, Mr. Hendricks, an employé, and one or two others being at the stable at the time, which was 9 or 9.30 p. m.; that he did not again see plaintiff until the latter had come out of the hospital; that when he heard plaintiff was hurt he was at the hotel and did not get to the stable until after plaintiff had been removed to the hospital; that on the night he was hurt plaintiff wore black and brown stripped pants, lengthwise, and he wore a white hat and gray coat; that on the morning of the next day, about seven o'clock, a little after day, witness having occasion to go to the south side on business, passed over place where Jennings avenue is crossed by Texas & Pacific Railroad track, and that having heard the night before that plaintiff was hurt there and seeing three men standing there and being interested in the affair on account of his acquaintance with Cody, he stopped his horse and got out and thereupon discovered that some one had been scraping up the dirt; that upon further investigation he found the exact place where plaintiff was hurt, the blood being on the rail and having run down the rail on the crossing; that he saw a piece of cloth there and reached down and picked it up, remarking at the time "There is a piece of his pants," which witness recognized and identified — a piece of the pants plaintiff wore at the time; that it was three or four inches long and an inch or two wide and it was lying right under the edge of the rail between the ties and it was warped sideways, looking as if it had been run over by the wheels; that the blood had all been scraped up except what was on the side of the rail and a few spots on the ties and plank at the crossing; that the street is not
32 a graded street, only a pathway, telegraph poles standing where the path ought to be, but there is a path used by travelers; that the place where witness found piece of cloth and blood was near and east of the street railway car track and sidewalk on the east, that the place where — found piece of cloth and blood is marked "M" on stenographer's map; that the switch-stand, which is a little up from the switch is right on the sidewalk where pavement would be, if there was any; that he can't remember what he did with the piece of cloth, probably threw it away, not thinking that it would be needed; that he is positive that it was part of Cody's pants, because he remembers when he bought them and he remembers asking Cody when he first put them on where he got them; that the morning after plaintiff was injured was cloudy and foggy and the night was foggy and misting a little, the moon was

not shining; that prior to accident witness frequently passed this crossing at night at various hours up to twelve o'clock and does not remember seeing any light there.

Cross-examined, witness E. E. MILLER testified:

That from the time witness became acquainted with plaintiff in November, 1891, until plaintiff was hurt they both boarded at the St. Charles hotel in Fort Worth, and after plaintiff got out of the hospital continued to board at the same place for quite a while; that witness and plaintiff had frequently talked about this case; witness is in commission business in Fort Worth, at 106 Front street; that on the night plaintiff was injured witness went to see him at Kentucky stable and was there fifteen or twenty minutes, there being present Mr. Young, Mr. Homer Hendrick, a negro man named Black and Mr. Atwood; that he found and left plaintiff at the stable; that the hotel was close by the stable; that the men whom he saw at Jennings Avenue crossing the next morning he took to be railroad men; that plaintiff bought the pants two or three days before the accident; that when witness picked up the piece of cloth it was lying by the side of and under the rail; that the rea-
33 son why he got down and looked at the crossing was that he was interested in plaintiff, was acquainted with him; that he heard that plaintiff was hurt a few minutes after he was hurt; that witness was at the time in bed at the hotel but not asleep; that he heard some one wake Mr. Young up and say he was wanted at the stable, some one was hurt; that Mr. Young was three or four rooms from witness; that witness lay still, not thinking anything about it, thought it was probably some of the stable hands; that after a while he began to think it might be something serious and he heard some one in the hall say it was Cody; that he then got up and went to the stable, arriving there at 11 or 12 o'clock, say 12 o'clock; that just before he reached the stable Cody was taken to the hospital; that when he heard that Cody was hurt he got up and dressed himself; that he did not go to the hospital; that he thinks he was told by negro at stable that night that Cody had been hurt at Jennings Avenue crossing; that the morning before the accident he arose as usual about an hour before day.

W. B. WHEELER, witness for plaintiff, testified:

That for seven years he had resided on Jennings avenue in Fort Worth, Texas, and is familiar with the T. & P. Railroad crossing on said avenue, having crossed it many times, day and night, going from town to his residence; that he thinks arc light was put at said crossing when he was in the ice business near there; that he sold out ice business in April, 1892; that he remembers one night when the light was not burning, though that was a common occurrence all over town and he did not pay much attention to it; that he thinks the lights were put up two years ago this winter, and it was after that he noticed the light out one night; that they have much trouble with several of the lights; that they went out near his house and one half way between his house and the crossing did not burn

well, it had to be adjusted; that he spoke to electrician
34 about them one day and he said there was something wrong and he had to adjust them.

Cross-examined, witness WHEELER testified:

That he could not say positively when the arc light at T. & P. crossing was put in, but it was some two years ago; that he thinks it will be three years along this fall or winter.

CHARLES MEALEY, witness for plaintiff, testified:

That he is a police officer at Fort Worth and in March, 1892, his business was running a water wagon; that for about two years he had known plaintiff by his dealing in stock, being otherwise unacquainted with him; that on the night of March 4th, 1892, he was on Jennings avenue on the south side, looking for his horse that had escaped about dark, and thinking that it had gone to its former home out there, as it generally went there when it got out; that at that time he lived north of the Texas & Pacific railroad; that not finding his horse, returned on Jennings avenue and when near Burton Lingo & Co.'s lumber yard at place marked "G" on stenographer's map going north down sidewalk about 150 feet from crossing, he heard a man scream at the crossing and running there he found plaintiff on the ground on his face just south of track at place marked "B" on stenographer's map about the middle of the street, the cars having run over him; that there was no light burning near there at the time and he did not see any cars or anything, though he could hear the rumbling of mill; that it was a dark night, cloudy and sprinkling rain and damp; that he heard no ringing of bell and saw no light other than signal lanterns up and down the road; that before he heard plaintiff halloo he saw no light, he thinks blue switch-light was burning, but it afforded no light for crossing; that the switch-light which was red on one side and blue on the other was there to indicate to the trains what track they should run on, they don't give any light more than a red spot; that lanterns could be seen but the crossing could not be seen by them: could not see
35 how to walk hardly; that when he got to plaintiff the train had just run over him, though train could not be seen until you got right at it; that the train was backing west, engine being on east end; that witness was the first person who reached plaintiff after he was run over; just after that two switchmen got there with lanterns; that they turned plaintiff, who was on his face, over and some one asked "Who is he" and plaintiff said "Take me to the stable where my horses is;" some one says *what* "What stable" and he says "Kentucky stables;" that witness then recognized plaintiff as the man he had frequently seen with Cleveland bay horses; that they took hold of him; that witness started to take hold of him, but three switchmen picked him up and started off with him and they carried his east thirty or forty feet to the place marked "*Ma*" on stenographer's map; that witness remained there until in a few minutes hoodlum wagon came; that plaintiff was

then placed on a cooling cot and put in the wagon and taken to the stable; that Dave McGraw drove the wagon and Judkins was the man with him; that the wagon was crowded and witness did not think there was room for more than two men with the cot in the wagon; that on account of being busy witness did not see plaintiff after the accident; that at the time of the accident he did not know plaintiff was walking in front of him, not having seen him; that witness could not say whether in March, 1892, any light was kept burning at Jennings avenue except that one night when it was not lit, but whether there was a lamp there or not he could not say, inasmuch as though his business required him to cross there seven or eight times a day he seldom passed there at night; that the morning after the accident witness was at the crossing and there were several people talking about the man that had been run over there; that witness did not see any blood, though it looked like a man had been dragged along from the switch-light on the path towards the east; the switch-light was on the east.

36 Cross-examined, CHARLES MEALEY testified:

To the following questions: "If it was so dark you could not see the train 150 feet away, why were you hunting for horses there in the dark; did not you know you could not see them?" the witness answered, he might have, and that he, the witness, had started awhile ago, that he could not see the train 150 feet away, and as how he, witness, expected to find his horse if it was dark, witness stated that he expected to find his horse at the place where he used to live; that witness left home about 8 o'clock that night and supposed that he had been out on the south side a couple of hours or more before the accident happened; that the whole train passed over Jennings avenue going west, the engine passing just as witness got there; that the engine had a headlight pointed east which threw a light down the track; that a man standing on the crossing could have seen where the headlight threw the light east; that witness when at Burton, Lingo & Co.'s could see down the track east of the crossing and he saw the lanterns of switchmen, though how far they were he could not tell, swing backward and forward down in the yard, but he could not see the switchmen; that it is not true that the engine was on the west end of the train there that night and that he is sure that it was on the east end; that witness was the first person who got to plaintiff; that when he heard plaintiff halloo it stirred him up and he ran to him not paying any attention to anything else; that he was not there a minute before other persons, not known to him, came.

J. W. JUDKINS, witness for plaintiff, testified:

That he had lived in Fort Worth 22 years and was an officer there March 4th, 1892; that his beat at that time included Jennings Avenue crossing; that he went on duty about 9 the night of March 4th, 1892, and that about 10.30 o'clock he was called to Jennings Avenue crossing; that arriving there he found plaintiff lying be-

tween switch track and main track at place marked "Ma" on
37 stenographer's map, about 75 feet, possibly a little further, from the crossing at Jennings avenue and the Texas & Pacific railway; that when he got there he found Charles Mealey and two or three others; that he got there in about 15 minutes after the accident; that he spoke to Cody after that and asked him "Where did you get hurt?" and he said "They run over me at the crossing;" that there was no light burning there at Jennings Avenue crossing that night, it was dark and raining; McGraw drove the patrol wagon from the place where plaintiff was picked up to where he was taken; that Mealey, another person and witness accompanied him to the wagon, witness going all the way holding his leg; that when witness first saw plaintiff, one man there had a lamp and the other a torch, that about 11 o'clock that night witness accompanied by Mr. Atwood, crossed Jennings Avenue crossing in a carriage hunting Dr. West and at that time there was no light burning at the crossing; that the railroad company had a watchman at the crossing, but he went off duty about 6.30 in the evening; that the does not know the men that had the lanterns and torch, but thinks he recognized one of them here today, he looked like a railroad man.

Cross-examined, witness JUDKINS testified:

The man whom you call Sullivan was, I think, one of the men I saw with a light at the time I got to Cody; that witness was 1,000 feet or more from Jennings Avenue crossing when he was told of the accident and that he at once walked to the place; that the patrol wagon arrived in about ten minutes afterwards; that Mealey and some one else got into the wagon with plaintiff, Mealey riding only part of the way, and that witness is not mistaken in saying that Mealey got in the wagon going up; that when, upon his arrival at the place where he first saw plaintiff, he talked with plaintiff and had the conversation related, three or four persons whose names he does not remember except Mealey were there; that he was in the office of defendant's counsel and talked to him about this
38 case but does not think that counsel asked him about this thing and that at the time he did not say anything about Cody's having told him anything and he did not intend to tell counsel anything about the light, because he knew what counsel was after; that he knew that counsel had a detective outside looking up the business; that he did not intend to tell counsel all and that he concealed that because he knew what counsel was driving at.

On redirect examination witness JUDKINS testified:

That it is a fact that the attorneys for Mr. Cody, the plaintiff, told him not to give away this information to the defendants on the other side.

J. S. WHILLEY, witness for defendant, testified:

That he has been employed by the Texas & Pacific Railway Company as a locomotive engineer for five or six years. On the night

of March 4th, 1892, he was running an engine for said company and it was, being in his charge, approaching the crossing of Jennings avenue and the Texas & Pacific railroad about the time the man got hurt; that the engine was coupled to about 18 cars, that head of pilot end being next to the cars and tank or tender in front, that is to say, the back end or tank of the engine was to the west and the front end was attached to the cars to the east, and the engine and cars in that condition were moving west towards Jennings Avenue crossing when the accident occurred; that the tank was wedge-shaped and not square like the tank of road engines; that there were headlights on both ends of the engine, both being the headlights ordinarily used on locomotives; that the light on the tank was on top and emitted its rays west, so that he could from his position see objects 130 or 140 feet away and a man on the main track to west could see the headlight for over a quarter of a mile, the engine being at the time on the main track; that when the engine was within about forty feet east of Jennings Avenue crossing, moving west, witness heard a man halloo, the man being about 4 cars east of the engine and the cars being each 30 to 34
39 feet in length, so that the man was hurt about 160 feet east of the crossing; that there was no street at the place where the man was hurt, it was on the company's private grounds; that witness went not over 30 or 40 feet from where he heard the man halloo, stopping the tank and engine about on the crossing; that witness then lit his torch and went to the man, find him about 160 feet east of Jennings Avenue crossing; that after asking him several questions, to which he did not reply seeming to be in considerable pain plaintiff — to witness "My name is Cody; you ought to know me; I travel with stud horses," the other switchman having just previously come up; that one of the switchmen telephoned for a patrol wagon; that witness asked plaintiff how he got there and said "that I was going there" pointing to Front street; that witness was the first man that got to plaintiff, the next who was either Sullivan, Slateen or Sadler, the switchmen, arriving in not more than five minutes, they having simply to come a car's length; that when plaintiff was hurt there was nothing at the crossing to witness' knowledge that he could see the electric light shining as bright as day and the headlight from the tender shining over the crossing, so that it was impossible for witness not to see, that he had no reason to look in any other direction; that the electric light at Jennings Avenue crossing was burning at the time, making the place where the accident occurred as bright as day; that a man named Beavers now dead, was fireman on the engine at the time; that the other switchmen were Slateen, Conners and Sadler; that Slateen and Conners are in the penitentiary and the last heard of Sadler he was in Mexico; that on approaching Jennings Avenue crossing Beavers was on the engine on the right side of witness and was looking out of the window ringing the bell, he having been constantly ringing the bell from Main street to Jennings avenue; that Beavers was very careful to ring the bell; that when witness

and associates reached Cody they picked him —, and some
40 of them lifted him about two feet and placed him on a cushion, which one of the men had brought from switch shanty; that Cody was found by witness about 160 feet east of Jennings Avenue crossing and was not removed at all except to be placed on the cushion, and at that point he was taken in charge by patrol wagon; that witness was the first man to reach Cody after he was hurt; that Cody's hat could not be found, though witness and others looked for 200 or 300 feet in all directions for it; that witness looked over car trucks, engine wheels and everything else thoroughly and could not find anything on them at all; that ten or fifteen of them having torches and lanterns went up to Jennings avenue and could not see any remnants of clothing or anything on Jennings Avenue crossing, or any other place; that witness noticed blood on the ground where plaintiff was hurt, but did not pay any particular attention to the track.

Cross-examined, witness J. S. WHILLEY testified:
The train was running west and the cars ran over plaintiff, though witness does not know what part of car or which car; that witness and companions examined crossing and could not see any signs there and could not see any signs on engine, cars or anywhere else, except where Cody was lying; that witness did not see Mealey that he knew of there; that they looked for plaintiff's hat because he asked for it; that witness is certain that arc light was burning bright as day and that it was burning when patrol wagon came up and when it left.

Re-examined, witness J. S. WHILLEY testified:
That witness and companions measured distance from Jennings Avenue crossing to where Cody was found by cars and rails, it was by that measurement 160 feet; that switchmen who are not here, also measured it; that witness does not know whether Sullivan who is here, assisted in measurement.

41 MICHAEL SULLIVAN, witness for defendant, testified:
That he is now yardmaster of the Missouri, Kansas & Texas Railway Company at Hillsboro; was night foreman for the defendant at Fort Worth on March 4th, 1892; that when Cody was hurt witness was on the rear end of the train of 15 or 18 cars that caused the injury; that witness' attention was attracted by the train's stopping, the center being opposite where the man was hurt and he walked from rear to see what was the matter; that he went west and before he got to the engine he saw the man when within three or four car-lengths from him by reflection of electric light on Jennings avenue; that Whilley, engineer, was the first man that got to Cody; witness was the next, about a minute later; that when witness reached plaintiff he asked him what his name was and where he belonged and he replied that it was none of witness' d—d business; that by that time the rest of the boys had got to Cody, and witness had them to get cushion out of switch shanty; that

witness went and telephoned for patrol wagon and getting back found Cody on the cushion on his back; that Cody was not moved from place where he was struck except put on a cushion until patrol wagon came and took him; that Cody was not struck at Jennings Avenue crossing, but at a point 150 or 175 — east of that crossing; that witness observed where Cody was lying and saw rail where his foot had been mashed, right opposite his bed, and that that was some distance, 150 to 175 feet east of crossing; that it was about twenty minutes before patrol wagon arrived; that the front end of engine was next to cars and the rear end was going west backing up; that on the engine there were two headlights, one on the tank and the other on the front; that the headlights were burning at the time and were the same as used on all engines; that the front headlight reflected on rear car backing, and the rear headlight on the tank reflected towards Jennings avenue; that by the headlight a man could be seen on the rail for six or seven telegraph
42 poles and the wedge tank on the engine would not obstruct the view; that at Jennings Avenue crossing at that time an arc electric light, elevated about 30 or 40 feet above the track and having illuminating power sufficient to radiate its rays 200 feet in all directions, was burning; that on approaching Jennings Avenue crossing and until the engine stopped on the west side of the crossing, Jeff. Beavers, fireman, was ringing the bell; that engine was running slowly at the time, not over four or five miles per hour; that witness and whole crew examined cars and wheels; that they got their lamps and torches and examined the whole thing from where Cody was hurt to crossing and they found blood on two pairs of trucks only, one being right opposite where he was and the other the distance between the cars, about six feet away, found no blood on engine; that he does not know how long Cody had been struck when engine stopped, did not hear him halloo; that witness did not see Cody's hat, though he heard him say as he was being put into the patrol wagon that he had bought a new hat that day and asked for it; that witness drinks whiskey himself, and when he stooped over Cody that night his breath smelled just like witness' does when he drinks whiskey; that he could not say Cody was drunk or how much whiskey he had drank, but the smell of whiskey was there strong.

Cross-examined, witness MICHAEL SULLIVAN testified:

That bell on switch-engine rang at Hillsboro last Sunday night; that as a general thing a man on the engine having charge of ringing of bells rings it; that he remembers why bell rang at Fort Worth on switch-engine on night of March 4th, 1892, at Jennings Avenue crossing, because just before cars stopped engine blew whistle for brakes to come to sudden stop, and after whole train stopped bell was still ringing; that was why he went up to see what it was; that he remembers as a fact, and not from any custom, that bell rang on night of March 5th, 1892, March 1st, 1892, March 2nd, 1892, March
43 3rd, 1892, March 6th, 1892, March 7th, 1892, and March 8th, 1892, at Jennings Avenue crossing; that witness resigned his

position as foreman of Texas & Pacific Railway Company at Fort Worth on March 18th, 1892; that since then he has been in St. Louis and Hillsboro, having gone to work in the latter place November 29th, 1893; that witness could see Cody lying 150 to 175 feet east of Jennings avenue and that he was five or six cars east from where Cody was lying when he was hurt, that is, witness was eight or ten cars east of crossing and was on ground walking; that witness saw him three cars' length east of him; that cars are fully thirty feet long and thus witness was about 240 feet from crossing where Cody was hurt; that arc light at crossing would give light 200 feet from crossing down to where witness was; that besides witness there were three men on cars, witness being on rear car; that wind was blowing a little bit on the night of March 4th, 1892, and it began to rain about 1.30 a. m.; that witness had gotten on ground when train stopped and he walked towards engine; that on that night witness had a hand lantern burning signal oil; that Engineer Whilley had torch-light; that Whilley had been running that engine quite a while, that he worked month about, a month days and a month nights, he had another man changing about, each being on that engine all the while during their hours; that at that time it was witness' duty to oversee the work and make up trains and get aboard cars to see that everything was in the proper place; that switchmen got cushion at Jennings Avenue crossing from switch shanty; does not know who put Cody on the cushion, not being there, having gone to telephone for patrol wagon at that time; that witness rode back on patrol wagon and then found Cody on cushion, which was about five or six feet long; that witness, the engineer and two policemen and two or three strangers lifted Cody from the cushion into the patrol wagon; that last witness saw of cushion it was in switch shanty, it having been returned there, and that
44 it was recognized by him by having blood on the canvass side, that there being two sides, one oilcloth and the other canvass that Cody was placed on the cushion on the canvass side, lights being strong enough for witness to see that; that there were several lanterns there, witness and several of the switchmen having at the time hand lamps and the engineer a torch; that Engineer Whilley was present and he thinks all the switchmen were present when witness asked Cody who he was and where he belonged and when Cody replied that it was none of his d—d business; that this question was asked by witness and answered by Cody just exactly when witness reached him; that Whilley was near enough to hear the question and answer; that he could have heard it as he is a man of good hearing; that only time witness heard Cody ask for his hat was when he was going away in the wagon; that after the wagon left, witness, with switchmen and Whilley, he thinks, searched all around for the hat; that Cody lay where he was hurt until moved by patrol wagon, about 30 minutes, more or less; that the engine used that night was an ordinary engine, with eight wheels under the engine and eight wheels under the trucks; that the tank was wedge-shaped, and it is about a foot and a half on the rear end and about a foot and about four feet on the front end up and down;

that it has couplings as same as cars and steps at both ends; that the foot-board of the tender or truck is 12 or 14 inches wide and it extends in length the width of the tank and 16 inches on each side of the rails, that it is over the edge of the rails, making it wider that the track; that if the engine was standing on the track with tender on rear end, the foot-board would be the part extending furthest over the track, so that if a man standing on the track should be struck by the tender backing the part projecting, which would be the foot-board, would come in contact with his body first; that the foot-board is 3½ or 4 feet above the track; that a box car is about the same distance above the track, but from the bottom
45 of it up it is even, there being no projections, thus presenting a smooth surface.

On redirect examination witness MICHAEL SULLIVAN testified:

After Cody was run over and the train stopped they cut it in two and opened the crossing, in which situation matter remained for about an hour, when the cars were coupled and went west beyond the crossing; that it rained about 1.30 a. m. that night a pretty heavy rain for a while; that Cody was injured about 11.30 o'clock on the night of March 4th, 1892.

C. B. MCCAFFERTY, witness for defendant, testified:

That for the last eighteen months he had been clerk in the offices of the Fort Worth and Denver City Railway Company at Fort Worth, and on March 4th, 1892, was night watchman of the Texas & Pacific Railway Company at Fort Worth; that on that night, when between Jennings avenue and Main street, the latter being east of the former and about three blocks of 200 feet each from it, at about 11.20 o'clock, witness saw Cody about half way between the two streets, witness at the time going east and Cody west; that Cody had on no hat; that witness inquired what was his business and finding that he had none asked him to leave the yards, which he consented to do, whereupon witness directed him north to Houston street and he started that way; that Cody walked like a man that was drinking, reeling and walking unsteady; that he was close enough to smell and did smell whiskey on his breath; that within ten or fifteen minutes witness again saw Cody lying on what witness took to be a caboose pad about 75 or 100 feet east of Jennings Avenue crossing, witness having gone there on account of having heard that some one was hurt; that Whilley, Sullivan, Slayton, Saddler, and other railroad men were there, as well as others, and they were just fixing to put Cody in the patrol wagon, which arrived there just as witness did; that at the time witness was fa-
46 miliar with Jennings Avenue crossing having been then engaged at night-work there about two years, and that when witness saw Cody lying there, an arc electric light at the crossing was burning brightly; that said light illuminated the surrounding territory, so that it and a similar light over Main Street crossing would nearly meet and light the yard through, and the light at Jennings avenue shone in all directions; that about or a little be-

fore 11 o'clock, and before meeting Cody, witness had been at Jennings avenue and the light was there burning brightly; that it was at that period the duty of witness to preserve a record of lights, to look after them and see that they were burning; that if at any time one was out it was his duty to telephone to headquarters so that it could be adjusted; that he kept the record of lights in a book, which he always kept, his system being to note date and time of night when he discovered a light out and to make no notation if the light was burning; that he has the book with him and that it shows no entry for that night and that he made no record of that night; that it rained some that night after 12 o'clock and continued to rain during the night.

Cross-examined, witness C. B. McCAFFERTY testified:

That he was not acquainted with Cody prior to March 4th, 1892, but he knows plaintiff is the man he met prior to the accident, recognized him as the man, when, after he was hurt, he reached him; that witness would say that the two lights at Jennings avenue and Main street would meet and give a very good light from one crossing to the other; that on that night witness carried a dark lantern; that he saw Cody in the yards by the arc light and did not pull his bull's eye, or dark lantern, on him; that there was no moon, nor did it rain until after 12 o'clock; that witness would judge it was fifteen or twenty minutes after he first saw Cody until he saw him lying on the ground; that when witness spoke to Cody in the yard he told him to go towards Houston street to keep him from going towards the west end of the yards, where they
47 were switching; that Cody started like he was going to Houston street, but witness never noticed that he went outside of the yard, though Cody said he was going out; that in going out on Houston street Cody would have had to cross only two tracks; that witness could not say how many cars were in the yard that night, as they were in and out, switching in and out cars; that witness met Cody at the place marked C. A. C. on stenographer's map, and started him off towards place marked C. A. H., and that he noticed him until he reached place C. A. M.; that when witness met Cody he was standing in about two feet of him and he is positive that he smelled whiskey on his breath, because his instructions were to always notice whether a man was drinking, he having strict orders not to let any one who was drinking stay about the yard; that witness does not remember the color of clothes Cody wore, though they appeared to be an ordinary working suit; that witness does not remember which side of the track Cody was lying on when he saw him on the ground, whether on the main line or on the switch; that the reason that the witness can be more accurate where he met Cody when he saw him with his hat off and put him on the north side than he can as to where he was lying after he was hurt is that it is a part of his business, for which he is paid, to observe men in the yard, that he was paid to keep them from getting hurt as near as possible.

J. D. McNEELY, witness for defendant, testified:

That he had been living in Fort Worth nine years and is engaged in selling on the square there, gets eggs, butter, etc.; that he was never employed by the Texas & Pacific Railway Company; that on the night of March 4th, 1892, about 11 o'clock he was near Jennings Avenue crossing and saw a man on the track about 120 feet east of the crossing with his face down in his hands; that the man had no hat on and wore a light coat; that he could not distinguish him sufficiently to tell who he was; that the man was
48 almost bent over, with his hands on his knees and his face could not be seen to amount to anything; that witness walked within about fifteen feet of him and remembers it was kind of light there; that witness does not remember what kind of light was there, though he saw the man; that witness knows there was an electric light near Jennings Avenue crossing, but does not remember whether it was burning at that time, though he thinks it was.

On cross-examination witness J. D. McNEELEY testified:

That witness was working for the Crescent News Co. when he received over a month after the accident, a letter from the agent of the Crescent News Company, asking him for a statement concerning the accident; that within the last twelve months Charley Smith has asked witness if he was the McNeeley who knew anything about the Cody case and that he did not agree to pay witnesses anything for coming over here except to pay his expenses and he was getting three dollars per day; that witness is receiving for attendance five dollars per day, two dollars being for expenses, the railway company paying his railroad fare, and that he does not receive over five dollars per day altogether; that since March, 1892, witness has worked for a livery stable, Anheuser Busch and the Denver Railway Company; that he is now only engaged in buying on the square and does not represent anybody; that he shoots craps and does not always win; that the night he saw the man he was passing through the yard going home, living at that time west of Jennings avenue and that he always walked through the railroad yards going home; that it was nearest to go straight down Jennings avenue but he always goes up Front street from Main street to Jennings avenue; that there are six or seven tracks in the yards there; that the light at Jennings avenue and that at Main street almost meet, so that witness can see to walk through yards; that witness did not say anything to the man he saw sitting there; that he is not positive as to the track that the man was sitting on, but thinks it was the main track, that
49 the man was sitting on the north side with his feet inside of the track facing south; that witness was on the south side of the man and passed within 15 or 20 feet of the man without stopping; that witness thinks that ditches south of railroad track are more than 20 feet distance from it; that he does not think he was in the employ of the Texas & Pacific Railway Company or the news company at the time of the accident; that the way witness happened to be called upon to make a statement is that he told a

man by the name of Allen N. Boyd, an employé of the Texas & Pacific Railway Company or of the news company, the next morning that a man had had his leg cut off the night before and that he thought it was the same man whom he had seen sitting on the track; that it rained that night a couple of hours or so after the accident and that night witness was in bed when it rained, he has pretty good idea of the time; that witness has not been talking this case up pretty generally, has not spoken fifteen words about the case; that witness does not remember whether there was a light at the crossing that night, and if there was no light burning as he walked within fifteen feet of the man, he could see him sitting in the position described.

J. C. LORD, witness for defendant, testified by depositions taken June 9, 1892:

That he is now and has been for three and a half years superintendent of the Fort Worth Light and Power Company, said company having been engaged during that period in furnishing electric light and gas and power to the public generally in Fort Worth at any and all points demanded; that since about the middle of May, 1891, until and including present time, said Fort Worth *and* Light and Power Company has been furnishing, under an agreement, the Texas & Pacific Railway Company with electric light by means of an electric arc light, suspended by a wire about 25 feet above the ground at the middle of the crossing, at the place where the Texas & Pacific Railway track is crossed by Jennings avenue in Fort Worth, the agreement not being for any particular length of time, but having been all the time in effect and being to furnish electric arc light of two thousand candle power, to be supplied every night during the year from sunset to sunrise; that since the making of said agreement until the present time the light and power company has thereunder each and every night furnished an electric light at said crossing from sunset to sunrise, and that on the night of March 4th, 1892, said light was furnished at said crossing; that by agreement between the light and power company and the railway company said light should be paid for monthly on the 4th or 5th of each month for the next preceding, and it has been paid for during all of said time pursuant to agreement.

Cross-examined, witness J. C. LORD testified, in said deposition:

That the Fort Worth Light and Power Company did not, to his knowledge, have any trouble with the light at Jennings Avenue crossing about March 4th, 1892; that all lights are subject to disturbances and sometimes go out and that his company keeps a man on duty until 10 o'clock at night to answer all complaints on that account, that being the time they most frequently occur; that he does not know that the Jennings Avenue light had been in the habit of going out or giving trouble about that time; that no one ever complained to him of the insufficiency or uncertainty of the light at said crossing during the early spring of 1892, and he didn't

know of any cause or reason existing to render that light uncertain during the month of March, 1892; that witness does not mean by his answer to direct interrogatories that the light and power company's engines, dynamos and other apparatus were in good order on the night in question and that said company was furnishing electric light to the people of Fort Worth in general on that night, he having no positive knowledge of the state of this particular light at that time.

J. S. WHILLEY, witness for defendant, being recalled testified:
51 That it was 11.30 at night that Mr. Cody got hurt.

H. B. HENDRICKS, witness for plaintiff in rebuttal, testified:

That he has known Cody since December 26th, 1891, and saw him at Mr. Young's stable on the night of March 4th, 1892; that witness was with Cody all that day until a quarter of ten at night and knows that he was not drinking; that Cody in company with witness and Mr. Young, proprietor of the stable, drank one glass of beer about 9.30 that night and that was all that Cody drank that day; that Cody and witness worked and boarded at the same place and that Cody could not have taken a drink without witness seeing him; that about a quarter to ten o'clock Cody left saying he was going to visit a friend and would be back in a short time and asking witness to look after his horses until he returned; that witness did not see him again until he was brought back injured, which was not more than an hour at the outside; that after Cody was brought back witness, in company with Mr. Judkins and Mr. Atwood, went over to the south side after a doctor; that they crossed the Texas & Pacific track at Jennings avenue and returned in fifteen or twenty minutes and witness knows that no light was burning at said crossing when they crossed either going or coming.

Cross-examined, witness H. B. HENDRICKS testified:

That at the time Cody was hurt his and witness' horses were adjoining in the stable and they worked there together all the time; the saloon where they took the glass of beer was kept by Mr. Buchanan; that witness, Judkins and Atwood went after the doctor on south side in an open conveyance, without doors and open all around.

W. F. ATWOOD, witness for plaintiff, testified, in rebuttal:

That he has known plaintiff six or seven years; that he saw him in Fort Worth on March 4th, 1892, during the day and during the evening until something near 10 o'clock at the Kentucky
52 stables at Fort Worth; that Cody was not drinking that day; that Cody had been working for witness for a long time and he would have known if Cody was drinking; that about 11.30 that night witness saw him at Kentucky stables in patrol wagon with one leg crushed; that accompanied by Judkins and Hendricks, witness went after doctor to south side, crossing Jennings Avenue crossing about 15 minutes to eleven o'clock; that it was a misty night and raining some and there was no light at Jennings Avenue crossing when witness and companions crossed there.

Cross-examined, witness W. F. ATWOOD testified:
That Hendricks drove the carriage which was an open two-seated rig.

J. W. JUDKINS, witness for defendant, upon being recalled, in rebuttal testified:
That witness when he reached Cody down near Jennings avenue found him lying on the ground and did not see any cushion; that witness got right down over Cody and assisted in putting him in the patrol wagon and did not smell any whiskey on his breath; that Cody was not intoxicated—he did not appear to be drinking—his talk did not indicate that he was drinking.

Cross-examined, witness JUDKINS testified:
That he was close enough to smell Cody's breath and to know whether he had been drinking or not; that while his thoughts were more particularly directed to Cody's mangled condition, still he had handled a great many men in that condition and would have noticed it if he had been drinking.

MARTIN MCGRAW, witness for plaintiff in rebuttal, testified:
That he is now alderman in Fort Worth; that on the night of March 4th, 1892, he drove patrol wagon; that on that night he went with wagon after Cody and found him not far from Jennings
Avenue crossing, about 30 or 40 feet east of the crossing;
53 that he does not remember whether there was any arc light burning at Jennings avenue that night or not; that he remembers there was some torch-lights burning up where Cody was lying, but does not recollect whether any lights that could show Cody lying on the ground other than the light from the torches and lanterns.

Cross-examined, MARTIN MCGRAW testified:
That it was between 10 and 12 o'clock at night but he cannot recollect the exact hour when they reached Cody; that they put him in the patrol wagon and carried him to the Kentucky stables.

Dr. W. B. WEST, witness for plaintiff in rebuttal, testified:
That it was a few minutes past eleven o'clock when he saw Cody at the Kentucky stables; that Cody was not then intoxicated; that witness remembers the first time he ever saw the electric light up at Jennings Avenue crossing; that he goes up there every night, and there was not an arc light there on the 4th of March, 1892, when witness came from supper at half past seven o'clock; that he crossed there that night and there was no light there.

Cross-examined, witness Dr. W. B. WEST testified:
That there was no light burning at said crossing at half past seven o'clock that night; that as to after that hour he cannot say, as he did not come back; that there had never been one burning until a few nights afterwards; that there had never been an electric light on Jennings Avenue crossing before two nights afterwards.

H. D. Cody, plaintiff recalled in rebuttal, testified:

That he had not drank any whiskey on the evening of March 4th, 1892; that he drank a glass of beer just before leaving the stable to go to the south side; that witness McNeely did not see him sitting on the track near Jennings Avenue crossing, and that plaintiff was not in fact sitting on the track as described by McNeeley; that he did not meet witness McCafferty in the
54 Texas & Pacific yards that night; that he was not in the yards that night; that he had no conversation with McCafferty that night; that no one in the yards ever asked him to get out of the yard; that he never saw witness McNeeley before this trial in his life.

The above and foregoing being a statement of all the facts in evidence defendant before the jury retired, under the charge of the court, requested the court to give the jury the following instructions:

No. 1. The defendant asks the court to instruct the jury to return a verdict in this case for the defendant.

No. 3. You are instructed that it was the duty of plaintiff upon approaching the railroad track on Jennings Avenue crossing, if he was hurt on said crossing, to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing, and if you believe from the evidence that he failed to stop and look and listen and that in consequence of such failure he was injured, you will find for defendant, even though you should believe from the evidence that the defendant was negligent either in respect to not furnishing a light at said crossing or in respect to not giving signals of the approach of the train or was negligent in respect to both of such matters.

No. 7. You are instructed that the rights of the railway company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings.

The above special instructions were separately presented and asked, and the court refused, and the defendant then and there upon such refusal excepted to the action of the court upon the same, and this bill of exceptions was tendered, allowed, signed and sealed by the court, and thereupon the court charged the jury by request of defendant as follows:

No. 2. If you believe from the evidence that at the time
55 plaintiff was injured he was intoxicated and that he would not have been injured cut for his intoxication you will return a verdict for the defendant.

No. 4. You are instructed that if you believe from the evidence that the defendant before the accident in question contracted with a light company to erect at Jennings Avenue crossing an arc light of sufficient illuminating power to light the crossing and to render visible to travelers upon such avenue, cars that might be approaching said avenue and that in pursuance of such contract the arc light was actually erected and that it — so generally burning during the

night that defendant had reason to believe and did believe that it was burning on a particular night, the fact that it may have not been burning during such particular night could not be chargeable against defendant as negligence.

No. 5. You are instructed that the law imposes no duty upon a railway company to have its crossings lighted, and that if in a given instance there is no light at the crossing the absence of such light is to be considered only as it may, if at all, effect the question of negligence. And upon the issue of negligence as applicable to such a state of case, you are instructed that the duty incumbent upon the defendant is to exercise only such care as a man of ordinary prudence would use under the circumstances in respect to the furnishing of a light at the crossing, and if under the circumstances a man of ordinary prudence would not have a light, the absence of the light would not be negligence on the part of the railway company.

And the court in its general charge instructed the jury as follows:

In this case the jury are instructed that plaintiff sues the defendant for the sum of $10,000.00, which he says he is entitled to by reason of injuries inflicted on him by defendant company in crushing his leg and causing its amputation, by serious injuries to his head and by the bodily and mental pain incident and resulting from said injuries, as also from his diminished capacity to
56 earn a living. He also alleges that he has incurred liabilities for nursing, lodging, attention and physician in the sum of $700.00.

2nd. If you believe from the evidence that plaintiff was injured on defendant's track east of Jennings avenue then you will find for the defendant.

3rd. If, however, the jury find from the evidence that the plaintiff was injured by the defendant on its track on the crossing of Jennings avenue in Fort Worth, then you are instructed that the statutes of the State of Texas provide "that each locomotive engine shall have on it a bell or a steam whistle and that the bell shall be rung or the whistle blown at the distance of at least 80 rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street or stopped."

4th. The plaintiff, if he was injured on Jennings avenue while attempting to cross defendant's track was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger, should he not do so and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train.

5th. Should you believe from the evidence that the plaintiff knew, or by the use of reasonable diligence might have known, of the ap-

proach of defendant's train and thereby have avoided the danger, then you will find for the defendant.

6th. If, on the other hand you believe from the evidence that the plaintiff's negligence was not the proximate cause of his injuries and that plaintiff, without fault on his part, was injured by de-
57 fendant at Jennings Avenue crossing through want of proper care on the part of the defendant, then you will find for plaintiff, in any sum not to exceed $10,000.00.

A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault and such neglect on the part of the road results in his injury, then he can*not* recover.

7th. The degree of care that was proper care on the part of the plaintiff and defendant must fit and grow out of the time, the occasion and circumstances. If the night was dark and misty and no arc light or other light lit up the crossing at Jennings avenue, then to the extent that such facts, if at all, increased the danger at the crossing of Jennings avenue, then to that extent was greater care and prudence required of both plaintiff and defendant at said crossing.

8th. The care to be exercised is such as an ordinary prudent man would exercise under similar circumstances. This is the true rule whether applied to the alleged negligence of the railroad company or the alleged contributory negligence of the plaintiff, and what is due care under a given state of facts must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence.

9th. If plaintiff was injured at the crossing of Jennings avenue over defendant's track and his failure to use the care that a person of ordinary prudence would have used under the circumstances was the proximate cause of his injuries then he cannot recover although defendant may have also been guilty of negligence in the matter of failing to ring the bell on the engine or in some other matter.

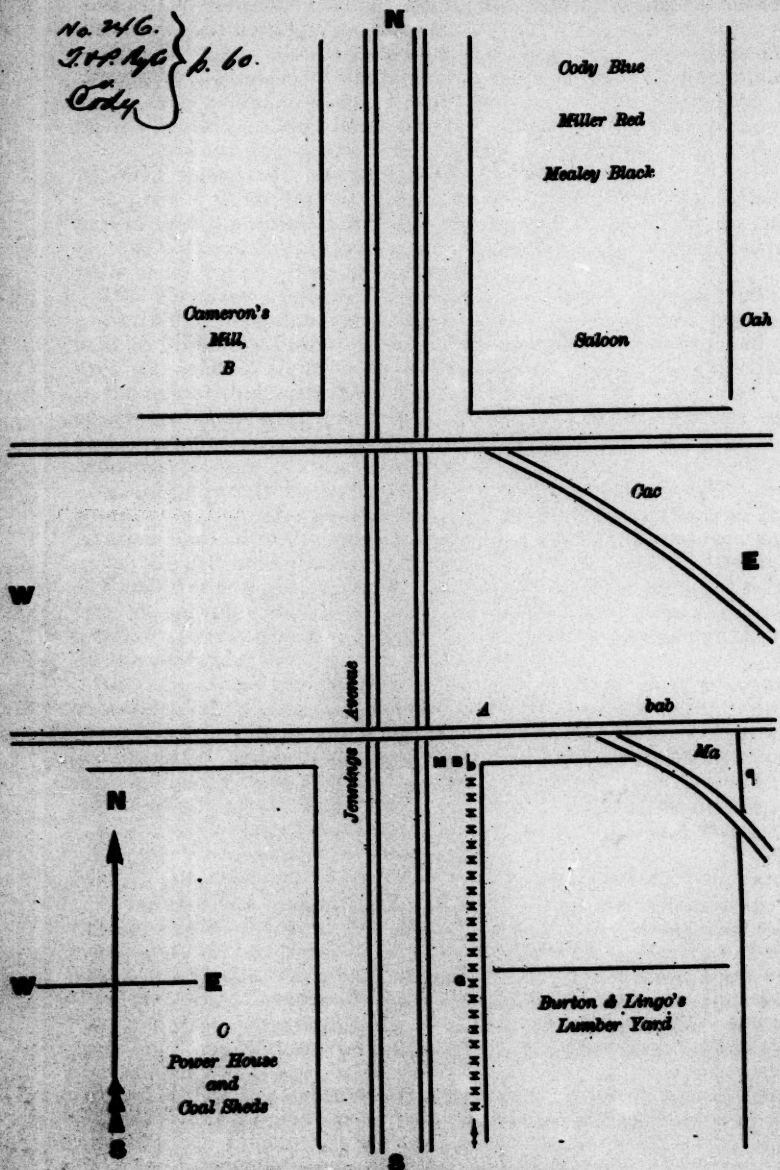
And to said charge defendant in open court then and there excepted for the following reasons:

58 1st. Because the court erred in that part of its charge wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, in this, that it presents an erroneous view of the law, which requires that the traveler upon approaching a railroad crossing shall be on the alert and stop and look and listen to ascertain whether, if he ventures on the crossing his life or limb may be imperilled by a train that may be nearing the crossing at the same time.

2nd. Because the court erred in that part of its charge wherein it instructed the jury that if they found for plaintiff they would find for him any sum not to exceed $10,000.00, in this, that said charge prescribes no measure of damages, but leaves their assessment to the unbridled discretion of the jury.

And thereupon the jury retired and after consideration returned

No. 246.
T. & P. Ry. } b. 60.
Cody



STENOGRAPHER'S MAP

a verdict which is copied in the judgment against the defendant, and thereafter the defendant moved the court on the grounds presented in its motion for a new trial, and said motion was overruled. Defendant now here tenders this its bill of exceptions, embracing all the foregoing matters, and asks that the same be allowed by the court and filed as a part of this record in this case.

T. J. FREEMAN AND
STEDMAN & THOMPSON,
Att'ys for Def't, T. & P. R'y Co.

We agree that the above and foregoing is a true and correct bill of exceptions.

This June 23, 1894.

WEST & SMITH,
Att'ys for Plaintiff, H. D. Cody.

Allowed:

JOHN B. RECTOR,
U. S. District Judge.

59 The foregoing has the following endorsement, to wit:

No. 1564. Henry D. Cody *vs.* The Texas & Pacific Railway Company. Defendant's bill of exceptions. Filed June 25, 1894. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

(Here follows diagram marked page 60.)

61–63 *Assignment of Errors.*

Filed June 25, 1894.

In the Circuit Court of United States for the Northern District of Texas, at Dallas, Texas.

HENRY D. CODY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendant, The Texas & Pacific Railway Company, by counsel, and says that in the record and proceedings in the above-entitled cause there is manifest error, to wit:

1st. The court erred in that portion of its charge wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, in this, that it presents an erroneous view of the law which requires that the traveler upon approaching a railroad crossing shall be on the alert and stop and look and listen to ascertain whether, if he ventures on the crossing, his life or limb may be imperilled by a train that may be nearing the crossing at the same time.

2nd. The court erred in that portion of its charge wherein it in-

structed the jury that if they found for plaintiff they would find for him in any sum not to exceed $10,000.00, in this, that said charge prescribed no measure of damages but leaves their assessment to the unbridled discretion of the jury.

3rd. The court erred in refusing special charge No. 1, asked by the defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," because the plaintiff failed to prove that he stopped upon approaching the crossing to ascertain whether a train was also approaching, he at the time knowing the fact that he was at the crossing.

64 4th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict for defendant," because the plaintiff failed to prove that he looked both ways upon approaching the crossing to ascertain whether a train was also approaching the crossing, he, at the time, knowing the fact that he was at the crossing.

5th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," because the plaintiff failed to prove that he either stopped, looked or listened upon approaching said crossing, at such distance therefrom as would be necessary to ascertain if a train was also approaching said crossing at the same time, he, at the time, knowing the fact that he was at the crossing.

6th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," because it was proved by the evidence that plaintiff failed upon approaching the crossing to exercise the care that a man of ordinary prudence would use under the circumstances, and that such failure of care on his part caused or contributed proximately to the production of the injuries he received.

7th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," because a fair preponderance of the evidence showed that defendant was not negligent in respect to lighting the crossing, but that it used due care to have said crossing lighted, and that it was actually lighted when plaintiff was injured.

8th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court

65 to instruct the jury to return a verdict in this case for defendant," because a fair preponderance of the evidence showed that plaintiff was not injured at the crossing, but at a place on defendant's private grounds, where he had no lawful right to be, and where defendant's trains and employés had the exclusive right to be.

9th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," be-

cause a fair preponderance of the evidence showed that the defendant's employés in charge of the engine were ringing the bell on approaching the crossing and therefore defendant was not negligent in that respect.

10th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," because a fair preponderance of the evidence showed that on the tank of defendant's engine there was a headlight which was burning at the time and therefore defendant was not negligent in that respect.

11th. The court erred in refusing special charge No. 1, asked by defendant, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant," because a fair preponderance of the evidence showed that plaintiff was injured when he was intoxicated and on account of his being intoxicated.

12th. The court erred in refusing special charge No. 3, requested by defendant, which is as follows: "You are instructed that it was the duty of the plaintiff upon approaching the railroad track on Jennings Avenue crossing, to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing; and if you believe from the evidence that he failed to stop and look and listen and that in consequence of such failure
66 he was injured, you will find for the defendant even though you should believe from the evidence that the defendant was negligent either in respect to not furnishing a light at said crossing or in respect to not giving signals of the approach of the train, or in respect to both of such matters, because said charge states the law and is applicable to this case, as the evidence failed to show that plaintiff either stopped or looked both ways on approaching the crossing and that if he had stopped and looked both ways he would have discovered the presence of the train on the track.

13th. The court erred in refusing special charge No. 7, asked by defendant and which is as follows: "You are instructed that the rights of the railway company and of the public are not equal, but that the right of the company is superior to the right of the traveling public, on all parts of its track, even at crossings," because it states the law and was called for by the facts of the case.

14th. The court erred in not granting defendant a new trial on the ground that the verdict was contrary to special charge No. 4 asked by defendant and given by the court and which is as follows: "You are instructed that if you believe from the evidence that defendant before the accident in question contracted with a light company to erect at Jennings avenue an arc light of sufficient illuminating power to light the crossing and render visible to travelers on such avenue cars that might be approaching said avenue and that in pursuance of such contract the arc light was actually erected and that it was so generally burning during the night that defendant had reason to believe and did believe that it was burning on a particular night, the fact that it may not have been burning on such

particular night could not be charged against defendant as negligence," because under the charge as applied to the evidence the jury should have found for the defendant, inasmuch as all the matters herein submitted were established by evidence that could not be doubted.

67 And for the errors assigned defendant prays that the judgment herein be reversed and cause remanded.

T. J. FREEMAN AND
STEDMAN & THOMPSON,
Att'ys for Def't, T. & P. R'y Company.

The foregoing has the following endorsement, to wit:

H. D. Cody *vs.* Texas & Pacific Railway Company. Assignment of errors. Filed June 25, 1894. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

Petition for Writ of Error.

Filed June 25, 1894.

HENRY D. CODY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

The Circuit Court of the United States for the Northern District of Texas.

To the judges of the circuit court of the United States in and for the northern district of Texas, at Dallas, May term, 1894:

Your petitioner, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, respectfully represents:

That at said term of said court, to wit: on May 30th, 1894, the plaintiff Henry D. Cody, recovered against petitioner a judgment in the sum of seven thousand five hundred ($7,500.00) dollars, besides interest at the rate of six per cent. per annum from date of judgment and costs of suit, in the proceedings for the recovery of which and in the rendition of which there was and is error to the great prejudice of petitioner; that plaintiff Henry D. Cody resides in Tarrant county, Texas, and that his attorneys of record Thomas F. West and Tillman Smith, partners under the firm name of West & Smith, reside in Tarrant county, Texas.

68 That petitioner has filed in this court its assignment of errors and here presents same for inspection of the court.

Wherefore, petitioner prays that it be granted a writ of error to remove said judgment and proceedings had in said cause to the United States circuit court of appeals for the fifth circuit, to be held in New Orleans, Louisiana, for revision, correction and reversal; and your petitioner will ever pray.

T. J. FREEMAN AND
STEDMAN & THOMPSON,
Att'ys for Petitioner.

The foregoing has the following endorsement, to wit:
No. 1563. Henry D. Cody *vs.* The Texas & Pacific R'y Co. Petition for writ of error. Filed June 25, 1894. J. H. Finks, clerk, by Charles H. Lednum, deputy.

Writ of Error Bond.

Filed June 25, 1894.

H. D. CODY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Circuit Court of the United States for the Northern District of Texas, at Dallas.

Know all men by these presents, that we, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, as principal, and —— —— as sureties are held and firmly bound unto Henry D. Cody in the sum of ten thousand dollars, to be paid to said H. D. Cody, his executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs executors and administrators, jointly and severally by these presents.

Sealed with our seals, using scrowls for seals, and signed with our names, this 25th day of June, A. D. 1894.

69 The condition of the foregoing obligation is such that whereas, lately at a term of the circuit court for the northern district of Texas, at Dallas, in a suit pending in said court between Henry D. Cody, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 1563 on the docket of said court, a judgment was rendered on the 30th day of May, 1894, that the plaintiff should have and recover of the defendant the sum of seven thousand five hundred dollars, with six per cent. interest per annum thereon, from date of rendition, as well as all costs of suit; and whereas, said Texas & Pacific Railway Company has obtained a writ of error and has filed a copy thereof in the office of the clerk of said court to reverse said judgment, and also a citation directed to said Henry D. Cody and his attorneys of record, West & Smith, citing and admonishing them to be and appear at the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, within thirty days from the 25th day of June, 1894.

Now, if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void; else to remain of full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By STEDMAN & THOMPSON, *Att'ys.* [SEAL.]
H. C. EDRINGTON. [SEAL.]
MARTIN CASEY. [SEAL.]
H. E. WANT. [SEAL.]

Approved:
JOHN B. RECTOR, *Judge.*

The foregoing has the following endorsement, to wit:

No. 1563. Henry D. Cody *vs.* The Texas & Pacific Railway Company. Writ of error bond. Filed June 25, 1894. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

70 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court before you or some of you, between Henry D. Cody, plaintiff, and The Texas & Pacific Railway Company, defendant, a manifest error has happened, to the great damages of The Texas & Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you can have the same at the city of New Orleans, Louisiana, within thirty days from the date hereof, in said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 25th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

Allowed.
JOHN B. RECTOR,
U. S. Dist. Judge.

71 UNITED STATES OF AMERICA:

The President of the United States to Henry D. Cody, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for fifth circuit, to be holden at the city of New Orleans, in the State of Louisiana, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein The Texas & Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not

be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 25th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN B. RECTOR,
U. S. Dist. Judge.

We hereby accept service of foregoing citation in errors. This June 26, '94.

WEST & SMITH,
Att'ys for Defendant in Error, H. D. Cody.

Clerk's Certificate.

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify
72 that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors and all the proceedings in cause No. 1563, wherein Henry D. Cody is plaintiff and The Texas & Pacific Railway Company is defendant, except that the original writ of error and citation in error are included therein instead of copies thereof, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness my hand officially and the seal of said court, at Dallas, Texas, this the 5th day of July, A. D. 1894.

[L. S.] J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

Endorsed: Filed August 1, 1894. J. M. McKee, clerk.

73 November Term, 1894.

TUESDAY, *January* 29, 1895.

(Extract from Minutes.)

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
HENRY D. CODY, Defendant in Error.

This cause was called on this day and submitted to the court after argument by Mr. T. J. Freeman, for plaintiff in error, and by Mr. E. B. Kruttschnitt, for defendant in error.

November Term, 1894.

TUESDAY, *February* 5, 1895.

(Extract from Minutes.)

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
HENRY D. CODY, Defendant in Error.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern
74 district of Texas, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further adjudged that the defendant in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, H. E. Edrington, Martin Casey, and A. E. Want, be condemned *in solido* to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

75 *Assignment of Errors.*

(Filed February 13, 1895.)

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
HENRY D. CODY, Defendant in Error.
No. 316.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas.

76 II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that portion of its general charge "wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, in this, that it presents an erroneous view of the law, which requires that the traveller upon approaching a railroad crossing shall be on the alert and stop and look and listen to ascertain whether if he ventures on the crossing his life or limb may be imperiled by a train that may be nearing the crossing at the same time."

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that portion of its general charge "wherein it instructed the jury that if they found for plaintiff they would find for him in any sum not to exceed $10,000, in this, that said charge prescribed no measure of damages, but leaves their assessment to the unbridled discretion of the jury."

77

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in holding that it committed no error in refusing to give special charge No. 1, asked by plaintiff in error, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant."

1. Because the plaintiff failed to prove that he stopped upon approaching the crossing to ascertain whether a train was also approaching, he at the time knowing the fact that he was at the crossing.

2. Because the plaintiff failed to prove that he looked both ways upon approaching the crossing to ascertain whether a train was also approaching the crossing, he at the time knowing the fact that he was at the crossing.

3. Because the plaintiff failed to prove that he either stopped, looked, or listened upon approaching said crossing at such distance therefrom as would be necessary to ascertain if a train was also approaching said crossing at the same time, he at the time knowing the fact that he was at the crossing.

4. Because it was proved by the evidence that plaintiff failed upon approaching the crossing to exercise the care that a man of ordinary prudence would use under the circumstances, and that such
78 failure of care on his part caused or contributed proximately to the production of the injuries he received.

5. Because a fair preponderance of the evidence showed that defendant was not negligent in respect to lighting the crossing, but that it used due care to have said crossing lighted, and that it was actually lighted when plaintiff was injured.

6. Because a fair preponderance of the evidence showed that plaintiff was not injured at the crossing, but at a place on defendant's private grounds, where he had no lawful right to be and where defendant's trains and employés had the exclusive right to be.

7. Because a fair preponderance of the evidence showed that the defendant's employés in charge of the engine were ringing the bell on approaching the crossing, and therefore defendant was not negligent in that respect.

8. Because a fair preponderance of the evidence showed that on the tank of defendant's engine there was a headlight which was

burning at the time, and therefore defendant was not negligent in that respect.

9. Because a fair preponderance of the evidence showed that plaintiff was injured when he was intoxicated and on account of his being intoxicated.

V.

79 The circuit court of appeals erred in affirming the judgment of the circuit court for the northern district of Texas and holding that it committed no error in refusing to give special charge No. 3, requested by plaintiff in error, which is as follows:

"You are instructed that it was the duty of the plaintiff upon approaching the railroad track on Jennings Avenue crossing to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing, and if you believe from the evidence that he failed to stop and look and listen, and that in consequence of such failure he was injured, you will find for the defendant, even though you should believe from the evidence that the defendant was negligent, either in respect to not furnishing a light at said crossing or in respect to not giving signals of the approach of the train, or in respect to both of such matters," because said charge states the law and is applicable to this case, as the evidence failed to show that plaintiff either stopped or looked both ways on approaching the crossing, and that if he had stopped and looked both ways he would have discovered the presence of the train on the track.

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in refusing to give special charge No. 7, requested by the plaintiff in error, which is as follows:

"You are instructed that the rights of a railway company
80 and of the public are not equal, but that the right of the company is superior to the right of the travelling public on all parts of its track, even at crossings," because it states the law and was called for by the facts of the case.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed; and it will ever pray.

(Signed) T. J. FREEMAN,
Attorney for The Texas & Pacific Railway Company, Plaintiff in Error.

Endorsed: Filed February 13, 1895. J. M. McKee, clerk.

81 *Petition for Writ of Error.*

(Filed February 13, 1895.)

United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
HENRY D. CODY, Defendant in Error. } No. 316.

To the Honorable Melville W. Fuller, Chief Justice, or to any associate justice of the Supreme Court of the United States:

Now comes the Texas and Pacific Railway Company, by its attorney, and complains that in the record and proceedings,
82 and also in the rendition of the judgment of the United States circuit court of appeals for the fifth circuit, sitting at New Orleans, in the above styled and numbered cause, on the 5th day of February, 1895, affirming the judgment of the United States circuit court for the northern district of Texas in said cause, manifest error hath intervened, to the great damage of the said The Texas and Pacific Railway Company; that the jurisdiction of the circuit court for the northern district of Texas in this cause depended upon the fact that The Texas and Pacific Railway Company, defendant therein, was a corporation created by an act of Congress; that the amount involved herein and the matter in controversy exceeds one thousand dollars, besides costs, and this is not a case in which the jurisdiction of the circuit court of appeals is made final.

Wherefore it prays for allowance of writ of error, to the end that this cause and said judgment may be carried to the Supreme Court of the United States, and it prays for supersedeas of said judgment and such other process as may cause the same to be corrected by the said Supreme Court.

(Signed) T. J. FREEMAN,
Attorney for the Texas & Pacific Railway Company.

Writ of error and supersedeas allowed and bond fixed at the sum of $15,000 this the 23rd day of February, 1895.

(Signed) E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed February 13, 1895. J. M. McKee, clerk.

83 *Writ of Error Bond.*

Filed March 4, 1895.

Know all men by these presents that we, the Texas and Pacific Railway Company, as principal, and George J. Gould, of the town of Lakewood, in the State of New Jersey, as surety, are held and

firmly bound unto Henry D. Cody in the full and just sum of fifteen thousand dollars ($15,000), to be paid to the said Henry D. Cody, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a regular term of the United States circuit court of appeals for the fifth circuit, in a suit depending in said court between The Texas and Pacific Railway Company, plaintiff in error, and Henry D. Cody, defendant in error, a judgment was rendered against the said The Texas and Pacific Railway Company, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry D. Cody or his attorneys of record, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington,
84 within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE TEXAS & PACIFIC RAILWAY CO.,
By C. E. SATTERLEE. [SEAL.]
GEO. J. GOULD.

Sealed and delivered in presence of—

(Signed) D. D. DUNCAN. [SEAL.]

Approved by—

(Signed) E. D. WHITE.
Associate Justice of Supreme Court U. S.

February 23rd, 1895.

Endorsed: Filed March 4, 1895. J. M. McKee, clerk.

85 *Opinion.*

(Filed February —, 1895.)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1894.

TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
HENRY D. CODY, Defendant in Error. } No. 316.

Error to the United States circuit court, northern district of Texas.

Before McCormick, circuit judge, and Bruce and Toulmin, district judges.

McCORMICK circuit judge, delivered the opinion of the court:

Reducing the assignment of errors in this case to its due proportion, excluding repetitions and argument, it appears that the plaintiff in error contends that the trial court erred:

86 1. In refusing to direct a verdict for the defendant.

2. In failing to instruct the jury as to the measure of damages.

3. In refusing to instruct the jury in the very words that it is the duty of a traveler to stop and look and listen, &c., before attempting to cross a railroad track.

4. In refusing to charge the jury that the right of the railroad company on every part of its track is superior to that of the public.

Five of the repetitions of the first assignment of error are in express terms based on the defendant's view of what "a fair preponderance of the evidence showed." It can hardly be made clearer that the case was not one to be withdrawn from the jury. The defendant did not submit a proper charge on the measure of damages. The plaintiff had lost his leg, had been two months in the hospital, had required and received medical, surgical, and other attention proved to be of the value of $700. He was thirty-five years old, a man of sound and vigorous health up to the injury, earning sixty-five dollars a month besides board and washing the year round. After the injury he could go only on crutches, could not earn any wages in the calling he had followed for the next preceding eleven years. He claimed only ten thousand dollars damages. The court might safely trust the average jury to measure the damages. The settled rule is that the party cannot complain of such omission when he omitted to propose and request a proper charge. If

87 the defendant had suffered injury from the want of such a charge—which it has not—it would be barred of redress by its contributory negligence. As to the third ground of error in our

redaction of the assignment, we are of opinion that the charge of the court on that subject was correct and sufficient. It was therefore right to refuse the requested charge. "A judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical answers to a judicial catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts, and if a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue the party aggrieved will be entitled to a new trial; but when he explains the whole law applicable to the case in hand, as we think was done in this case, he cannot be called upon to express it in the categorical form, based upon assumed facts, which counsel choose to present to him." 95 U. S., 161.

The fourth ground of error assigned is not well taken. The refused charge was in these words: "You are instructed that the rights of the railway company and of the public are not
88 equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings."

If we concede that as an abstract proposition the language of this request is technically correct, still standing alone as a requested charge it is defective and misleading, for the people have the same right to travel on public streets and ordinary highways that railway companies have to run trains on their railroad tracks.

The judgment of the circuit court is affirmed.

89 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Henry D. Cody, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error

what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 316. Writ of error. Filed March 4, 1895. J. M. McKee, cl'k.

90 UNITED STATES OF AMERICA, *ss:*

To Henry D. Cody or his attorneys of record, Thomas F. West and —— Smith, comprising the firm of West & Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas & Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 23d day of February, in the year of our Lord one thousand eight hundred and ninety-five.

E. D. WHITE,
Associate Justice of the Supreme Court U. S.

91 [Endorsed:] No. 316. Citation. Filed M'ch 4, 1895. J. M. McKee, clerk.

Service of the within citation is accepted and copy of same waived.
Feb'y 28, 1895.

WEST & SMITH,
Att'ys for H. D. Cody, Defendant in Error.

92 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 90 pages, numbered from 1 to 90, inclusive, contain a true copy of the record, pleas, process, proceedings, and all papers in the case of The

Texas & Pacific Railway Company, plaintiff in error, *v.* Henry D. Cody, defendant in error, No. 316, November term, 1894, as the same remains upon the files and records of said United States circuit court of appeals, and the original writ of error and the original citation.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 13th day of March, A. D. 1895.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 15,837. U. S. circuit court of appeals, fifth circuit. Term No., 246. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Henry D. Cody. Filed March 20, 1895.

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MAR 29 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 246.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

HENRY D. CODY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for the Railway Co.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. HENRY D. CODY.	No. 246.

STATEMENT.

This action was instituted April 20th, 1892, in the District Court of Tarrant County, Texas, by Henry D. Cody, who in his petition describes himself as a resident of said County and State, against The Texas and Pacific Railway Company, which company, he alleged, is

"a private corporation created and existing under *the laws of the State of Texas.*

* * * "The defendant owns and operates a line of railway extending into and running through the City of Fort Worth, Tarrant County, Texas, and have, for the purpose of conducting and carrying on its business in the management and operation of said line of railway, an office and agency and an agent and representative in the City of Fort Worth, in said Tarrant County, upon whom citation may be served in this case, the name of said agent being J. T. Clements" (Tr., pp. 2 and 7).

There is no proof or claim that any corporation has ever been created under the laws of the State of Texas, named The Texas and Pacific Railway Company, nor that any other corporation by that name owns and operates or has owned or operated any line of railway through the City of Fort Worth. That the plaintiff in error was incorporated under the laws of the United States and owns and operates a line of railway through the City of Fort Worth is, and has been from the time of its organization, a matter of common knowledge and notoriety, especially in the State of Texas, and were especially in the said City of Fort Worth and the County of Tarrant.

On June 6th, 1892, the case was removed from the state court to the federal court for the proper district (Tr., p. 6) on the petition of the defendant The Texas and Pacific Railway Company setting forth that it

"is a corporation organized under and by virtue of certain acts of Congress of the United States, to wit: An Act entitled 'An Act to incorporate The Texas and Pacific Railway Company and aid in its construction of its roads and other purposes,' approved March 3d, 1871; and an Act supplementary thereto approved March 2d, 1872; and that this is a suit arising under the laws of the United States within the meaning of the second section of an Act of March 3d, 1875, as amended by the Acts of March 3d, 1887, and August 13th, 1888."

The defendant company was originally chartered by the Congress of the United States by an Act entitled "*An act to incorporate* THE TEXAS AND PACIFIC RAILROAD COMPANY *and to aid in the construction of its road and for other purposes*" (16 Stats., 573). The first section of this Act of Congress enacts that certain persons by name

"and all such persons as shall or may be associated with them and their successors are HEREBY CREATED a

body politic and corporate in fact and in law by the name, style and title of the Texas and Pacific Railroad Company and by that name shall have perpetual succession and shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous line of railroad and telegraph line with the appurtenances from a point at or near Marshall, County of Harrison and State of Texas; thence by the most direct and eligible route to be determined by said company near the 32d parallel of north latitude to a point at or near El Paso; thence through New Mexico and Arizona to a point on the Rio Colorado at or near the southern boundary of California; thence by the most direct and eligible route to San Diego, California."

The Act makes a grant of right of way through the public lands and a grant of the public lands, declares the railway to be a military and post road and subjects it to public duties as such.

This Act was amended May 2d, 1872 (17 Stats., 59). The first section enacts "*That the name, style and title of the Texas and Pacific Railroad Company shall hereafter be* THE TEXAS AND PACIFIC RAILWAY COMPANY."

It was further amended March 3d, 1873 (17 Stats., 598), and June 22d, 1874 (18 Stats., 197).

Plaintiff, in his "first amended original petition" (Tr., p. 7), alleged that on March 4th, 1892, he was injured at the crossing of the track of the defendant company over Jennings Avenue, a street in the city of Fort Worth, Texas, and that the accident was caused by the carelessness and negligence of the defendant, its agents and servants.

Defendant, in its "first amended original answer," demurred generally, pleaded the general issue, and in special pleas alleged the contributory negligence of the

plaintiff, and his failure to exercise the care that a man of ordinary prudence would have used under like circumstances. The jury to whom the issues were submitted found a verdict in favor of the plaintiff for the sum of $7,500, for which sum, with interest and costs, judgment was rendered (Tr., p. 12). The case was taken to the United States Circuit Court of Appeals, for the Fifth Circuit, which court affirmed the judgment below (Tr., p. 46). The case was brought to this court by writ of error.

Assignment of Errors.

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that portion of its general charge "wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, in this, that it presents an erroneous view of the law, which requires that the traveller, upon approaching a railroad crossing, shall be on the alert and stop and look and listen, to ascertain whether, if he ventures on the crossing, his life or limb may be imperiled by a

train that may be nearing the crossing at the same time."

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in that portion of its general charge "wherein it instructed the jury that if they found for plaintiff they would find for him in any sum not to exceed $10,000, in this, that said charge prescribed no measure of damages, but leaves their assessment to the unbridled discretion of the jury."

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in holding that it committed no error in refusing to give special charge No. 1, asked by plaintiff in error, which is as follows: "Defendant asks the court to instruct the jury to return a verdict in this case for defendant."

1. Because the plaintiff failed to prove that he stopped upon approaching the crossing to ascertain whether a train was also approaching, he at the time knowing the fact that he was at the crossing.

2. Because the plaintiff failed to prove that he looked both ways upon approaching the crossing to ascertain whether a train was also approaching the crossing, he at the time knowing the fact that he was at the crossing.

3. Because the plaintiff failed to prove that he either stopped, looked or listened upon approaching said crossing at such distance therefrom as would be necessary to ascertain if a train was also approaching said crossing at the same time, he at the time knowing the fact that he was at the crossing.

4. Because it was proved by the evidence that plaintiff upon approaching the crossing failed to exercise the care that a man of ordinary prudence would use under the circumstances, and that such failure of care on his part caused or contributed proximately to the production of the injuries he received.

5. Because a fair preponderance of the evidence showed that defendant was not negligent in respect to lighting the crossing, but that it used due care to have said crossing lighted, and that it was actually lighted when plaintiff was injured.

6. Because a fair preponderance of the evidence showed that plaintiff was not injured at the crossing, but at a place on defendant's private grounds, where he had no lawful right to be and where defendant's train and employees had the exclusive right to be.

7. Because a fair preponderance of the evidence showed that the defendant's employees in charge of the engine were ringing the bell on approaching the crossing, and therefore defendant was not negligent in that respect.

8. Because a fair preponderence of the evidence showed that on the tank of defendant's engine there

was a headlight which was burning at the time, and therefore defendant was not negligent in that respect.

9. Because a fair preponderance of the evidence showed that plaintiff was injured when he was intoxicated and on account of his being intoxicated.

V.

The circuit court of appeals erred in affirming the judgment of the circuit court for the northern district of Texas, and holding that it committed no error in refusing to give special charge, No. 3, requested by plaintiff in error, which is as follows :

" You are instructed that it was the duty of the plaintiff upon approaching the railroad track on Jennings Avenue crossing to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing, and if you believe from the evidence that he failed to stop and look and listen, and that in consequence of such failure he was injured, you will find for the defendant, even though you should believe from the evidence that the defendant was negligent, either in respect to not furnishing a light at said crossing, or in respect to not giving signals of the approach of the train, or in respect to both of such matters ;" because said charge states the law and is applicable to this case, as the evidence failed to show that plaintiff either stopped or looked both ways on approaching the crossing, and that if he had stopped and looked both ways he would have discovered the presence of the train on track.

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in refusing to give special charge No. 7, requested by the plaintiff in error, which is as follows:

"You are instructed that the rights of a railway company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at the crossings," because it states the law and was called for by the facts of the case.

ARGUMENT.

I.

Since the removal of this case from the state to the federal court this court has announced its decision in the cases of *Tennessee vs. Union and Planter's Bank, 152 U. S., 455*, and *Oregon Short Line, &c., vs. Skottowe, 162 U. S., 490*, holding in effect that under the Act of August 13th, 1888 (Sec. 866), the federal courts have no jurisdiction of a suit involving a federal question unless such question appears by the plaintiff's original statement of his claim.

Inasmuch as in plaintiff's original petition in this case (Tr., p. 2), and in his first amended original petition (Tr., p. 7), the federal character of the defendant railway company is not set forth in express terms, it may be urged by defendant in error that under the

ruling in the case of *Tennessee vs. the Bank* the federal courts have no jurisdiction of this case.

Anticipating such objection, and recognizing the rule of this court that the question of jurisdiction is always in the record, we address ourselves to the proposition that this case does not come within the rulings of this court in the cases above named.

The Federal Courts have jurisdiction of this case.

The salient and controlling features of this case, as respects Federal jurisdiction, are that The Texas and Pacific Railway Company was by a public Act of the Congress of the United States directly created a corporation by the name of The Texas and Pacific Railway Company. This Court will judicially notice the Act of Congress thus creating the defendant Company, and, therefore, it distinctly appears that the defendant company is strictly and purely a corporation of the United States; and this Court has so adjudged in the Pacific Removal cases.

The question of jurisdiction of the Federal Courts is always in the record, and if the record does not show Federal jurisdiction, this court will take notice of that fact and adjudge and determine accordingly, whether the question of jurisdiction is raised by the parties or not.

In *M. C. & L. M. Ry. Co. vs. Swan*, *111 U. S., 379*, it was said by Mr. Justice MATTHEWS on behalf of the Court:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this Court, and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

In *Cameron vs. Hodges, 127 U. S. 322*, Mr. Justice MILLER (p. 325) said:

"This Court has uniformly acted upon the principle that, in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the Federal Courts, it would, on its own motion, take the objection of the want of jurisdiction in the Circuit Court, especially as regards citizenship (Hilton vs. Dickinson, 108 U. S., 165; Morgan's Executor vs. Gay, 19 Wall., 81)."

The principle thus announced has been so often applied by this Court that we deem it unnecessary to make further citations. Accordingly, the first question to which we address our argument is in support of the proposition above stated.

This case was removed from the State to the Federal Court June 6, 1892, before the decision of this Court in *Tennessee vs. Union and Planters' Bank, 152 U. S., 455*, was rendered (March 19, 1894). In that case it was held that, under the Act of August 13, 1888 (c. 866), the Circuit Court of the United States has no jurisdiction, either original or by removal from a State Court, of a suit involving a Federal question, unless it appears by the plaintiff's statement of his own claim that it arises under the Constitution or a statute or treaty of the United States.

The cases reported under this title were bills in equity to recover taxes levied by the State of Tennessee. Two of them were brought in the Circuit

Court of the United States and complainant's only allegation as to jurisdiction was that the *defendant claimed* that the State revenue law was in violation of the Constitution of the United States forbidding a State to pass any law impairing the obligation of a contract. The third case was brought in the State Court and was removed to the Federal Court though not even that allegation was made in the bill. **None of the parties to the causes was incorporated under laws of the United States nor did any of them possess any powers, rights or privileges under such laws.**

The rule thus announced was applied in *Oregon Short Line, &c., Co. vs. Skottowe, 162 U. S., 490* (decided April 20, 1896).

That case has not the slightest bearing on the question of jurisdiction in this case. The Oregon Short Line and Utah Northern Railway Company, defendant in the *Skottowe case*, was a consolidated corporation, which consolidated corporation was formed under authority given by State and Territorial legislation only. There was no act of Congress authorizing the consolidation. One of the constituent companies, to wit, The "Oregon Short Line Railway Company," was originally a Wyoming corporation, and another of the constituent companies, to wit, the Utah and Northern Railway Company, was originally a Utah Territorial corporation; but these two constituent companies had been respectively recognized as corporations by the acts of Congress, approved August 2d, 1882, and June 20th, 1878, referred to by Mr. Justice SHIRAS in *Skottowe's* case (p. 493). These two acts of Congress were applicable to two only of the constituent companies forming the consolidated company which was the defend-

ant in that case. They were the only acts that gave to the defendant company any federal character *or even federal flavor*. This consolidated company, under the laws of the State of Oregon, had taken a lease of or was operating the Oregon Railway and Navigation Company in Oregon. Skottowe was injured by the said consolidated defendant company at The Dalles on the Columbia River, and within the State of Oregon. Under these circumstances this Court held that the Oregon Short Line and Utah Northern Railway Company, the defendant in that case, did not appear to be a federal corporation. For these reasons we repeat that we cannot see that it has the slightest bearing on the question of the federal jurisdiction over the case now at the bar.

A careful examination of the opinion in the case of *Oregon Short Line, &c., vs. Skottowe, 162 U. S., 490*, shows that the decision of that case was confined to the particular facts involved, and that the Court plainly made it so, apparently for the purpose of avoiding an undue extension of the rule announced in *Tennessee vs. Union and Planters' Bank, 152 U. S., 454*.

The Court speaking through Mr. Justice SHIRAS, said:

"Even if the acts of Congress of June 20, 1878, and August 2, 1882, so far conferred substantial rights and privileges upon the territorial and state corporations, consolidated as the Oregon Short Line and Utah Northern Railway Company, as to bring that company within the doctrine of the Pacific Railroad Removal cases, yet we think that *the present case* comes within the rule of the Federal question, or Federal character of the defendant company must appear from the com-

plaint in the action in order to justify a removal, and that such Federal question or character does not so appear."

The acts referred to by the Court are 20 U. S. Statutes, 241, c. 362, and 22 U. S. Statutes, 185, c. 272, and have already been noticed *(ante*, p.). By these acts Congress merely recognized corporations already organized under local law. It conferred no new powers upon them.

The doctrine of *Osborne vs. Bank* and *The Pacific Railroad Removal cases*, as an examination of the opinions will show, is plainly that where the *very existence* of a corporation is due to a statute of the United States, where its rights, powers and privileges are derived from such a statute, it has a right to remove cases brought against it in State courts to the Federal courts. As we shall hereafter show, this Court has held, in the *Removal cases*, that this defendant The Texas and Pacific Railway Company is "strictly and purely a United States corporation," and that "the powers, privileges and advantages given to the company by Congress and the duties imposed upon it are specified in the acts referred to" (referring to the Act of Incorporation and amendments to it). In this respect it differs radically from the railroad corporations which were parties to the *Skottowe* case.

In view of these facts it is hardly probable that the remark of the Court in the *Skottowe* case above quoted was intended to apply to any other case than the one then before it.

In that case it was also said (pp. 496, 497) :

"Evidence tending to show that a company, styled the Oregon Short Line and Utah Northern Railway Company, was operating and conducting a line of rail-

road between Portland, Oregon, and The Dalles, Oregon, as a common carrier for hire; that the plaintiff, as a passenger for hire, was injured while in the lawful use of said railroad; that the injuries were caused by the defendant's negligence, and the nature and extent of the injuries thus caused would, if believed by the jury, have clearly sustained the material allegations of the complaint. To justify a recovery in such a case it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendant's corporate powers. The defendant's liability did not arise out of its grants of rights and privileges from the several Territories or from the United States. It grew out of its negligence and misconduct in the management of a railroad in the State of Oregon, into which State it is not pretended that it entered *by reason of anything contained in any act of Congress.*"

* * * * * *

"But, even if the Court was obliged, under the allegations of the plaintiff's complaint, to take judicial notice of the defendant company's charter, *no act of Congress was pointed out under which it was acting when operating the railroad in the State of Oregon.* So far as appears, the defendant company existed and was doing business in the State of Oregon solely under the authority of that State, whether express or permissive. *The two acts of Congress referred to do not disclose any intention on the part of Congress to confer powers or rights to be exercised outside of the Territories named therein.*"

It is evident, therefore, that the *Skottowe* decision rested on the special facts of the case, namely, that as the cause of action arose within the State of Oregon, "into which State it is not pretended that it [the railway company] entered by reason of anything contained in any Act of Congress," the mere fact that Congress had recognized the railway companies already existing in certain Territories of the United States, in which the State of Oregon was not included, did not impress the railway company with such a Federal character as would entitle it to the right and privilege of removing the case from the State to the Federal Court as involv-

ing a question arising out of a Statute of the United States. There is nothing in the opinion intimating that even if the plaintiff in his complaint had alleged the Federal Statutes above referred to they would have been held to be sufficient to justify a removal of the case from the State to the Federal Court on the ground that a right was involved based on a Federal Statute.

In the case now presented to the Court the defendant corporation was not simply organized under a public Act of the Congress of the United States; it was directly *created* by such act. All its rights, powers and privileges are derived solely from the United States. Among them are the right "to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." Under the decisions in *Osborne vs. Bank, 9 Wheaton, 738, 819-828*, and *Pacific Railroad Removal Cases, 115 U. S., 1*, the very right to sue a corporation created by the United States is held to be founded upon the laws of the United States. In the latter case Mr. Justice BRADLEY quoted the following from the opinion of Chief-Justice MARSHALL in the *Osborne* case:

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can

a being thus constituted have a case which does not arise literally as well as substantially under the law? Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case.

"The question forms an original ingredient in every cause. Whether it in fact be relied on or not in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involved, then, must determine its character, whether those questions be made in the cause or not."

THE LEGAL STATUS of the Texas and Pacific Railway Company as a Federal corporation had been directly adjudged by this Court in what are called The Pacific Railroad Removal Cases.

Among those cases was *The Texas and Pacific Railway Company against McAllaster; Texas and Pacific Railway Co. against Kirk; same against Murphy.* The judgment of this Court in those cases was that The Texas and Pacific Company, having been created and organized under the above mentioned Acts of Congress, was entitled to remove into the Circuit Courts of the United States suits brought against it in state courts on the ground that such suits

are suits "arising under the laws of the United States," and that (115 U. S., 16) the Texas and Pacific Railway Company "*is strictly and purely a United States corporation;*" and that "the powers, privileges and advantages given to the company by Congress, and the duties imposed upon it, are specified in the acts referred to" (those of March 3, 1871, and May 2, 1872).

It cannot be denied, therefore, that, in the language of the Judiciary Act, this is a suit of a civil nature arising under a law of the United States, of which the Circuit Court has original cognizance; nor that such a suit when brought in a State Court may be removed by authority of that act from the State Court to the Federal Court.

In this state of the decisions of this Court it becomes important to all corporations created by the laws of the United States to have the question determined whether a valuable right—that of removing cases from the State to the Federal courts—a right recognized and enforced by this Court for more than seventy years—may be annulled and rendered valueless by the mere neglect or refusal of a plaintiff bringing suit against such a corporation in a State Court to set forth in terms the source of its being; or, as here, by a false allegation of its incorporation. This question is now presented for the determination of this Court.

The Texas and Pacific Railway Company is the creature of the laws of the United States incorporated by a public act of Congress of which the Courts are bound to take judicial notice; an allegation of the title of the railway company is therefore a sufficient allegation of its Federal character.

If the complaint in this case had alleged the truth viz: that the defendant was a corporation created by an Act of Congress the case would unquestionably be removable to the Federal Court. But the complaint makes the false allegation that the Texas and Pacific Railway Company is a "private corporation created and existing under the laws of the State of Texas." This allegation is, however, accompanied by another stating that the defendant owns and operates a line of railway through the City of Fort Worth, which can refer only to the line of the plaintiff in error. That plaintiff, notwithstanding his false allegation as to the defendant's incorporation intended to sue this plaintiff in error is too evident to be controverted. His allegation must be ascribed either to inexcusable ignorance or to wilful misrepresentation made to affect the jurisdiction of the Federal Courts. Upon these facts this Court will judicially notice, that the defendant company is created by a public Act of Congress. The case is therefore just as clearly removable as if that fact had been alleged in the complaint, since it is not necessary, under any system of pleading, to allege facts which will be judicially noticed. It is a matter of common and universal knowledge that the Texas and Pacific Company is a Federal corporation, and none other, and our point is that the allegations of the complaint, taken in connection with the fact that this Court will judicially notice, *first*, that the defendant was created by an Act of Congress, and, *second*, that there is no act of the State Legislature in Texas, or in any other State, creating it a corporation, or creating any other corporation by that name, make the case one of unquestionable Federal jurisdiction.

Unless we concede that any person bringing suit

against a corporation of the United States may by his personal *ex parte* act confer upon or deprive the Courts of the United States of jurisdiction over his case, as his interest or whim may dictate, the soundness of this proposition must be acknowledged.

The decisions of this Court following the case of *Tennessee vs. Union and Planters' Bank (supra)* are as follows:

Chappell vs. Waterworth, 155 U. S., 102, an action in ejectment, brought in the State Court, which was removed to the Federal Court on a petition setting up that the title to and right of possession of the land in controversy was in the United States, the property being in use by the Government as a site for a light-house. This Court held that the case was improperly removed.

Postal Telegraph Co. vs. Alabama, 155 U. S., 482, in which it was held that a suit between a State and a citizen of another State is not a suit between citizens of different States, and therefore cannot be removed to a Federal Court.

East Lake Land Co. vs. Brown, 155 U. S., 488, an action in ejectment, brought in the State Court and removed on a petition stating that defendant's right and title to the lands in dispute were founded upon the homestead laws of the United States. The removal was held to be improper on the authority of *Chappell vs. Waterworth (supra)*.

Oregon Short Line vs. Skottowe, 162 U. S., 490, already reviewed, *ante, p. 11, et seq.*

It will be noticed that all the decisions of this Court

which require that the Federal question must appear in the plaintiff's statement of his case in order that the Federal Courts may have jurisdiction were rendered in cases where some right expressly conferred by the Constitution, laws or treaties of the United States was involved; or which required the construction of such Constitution, laws or treaties; or in which, as in the *Skottowe* case, the defendant corporation was not created by a law of the United States or whose powers were not derived therefrom.

We respectfully submit that in cases of the character of the one at bar where the party defendant is purely a corporation of the United States, deriving all its powers, privileges and advantages from a law of the United States, the real question relates to the *person* of the defendant corporation, and that the rule properly applicable in such cases should be analogous to that applied in cases where the jurisdiction of the Federal Courts depends upon the adverse citizenship of the parties.

The defendant in this action was incorporated and derives all its powers and privileges from the Act of Congress approved March 3, 1871 (16 Stats., 573, c. 122), and the acts amendatory and supplementary thereto. As has been shown above, this Court has held it to be "strictly and purely a United States corporation." The statute appears in the official publication of the laws of the United States as a "public act" as distinguished from a "private act." Its purpose was of a distinctly public character—the building of a railway from Marshall, Texas, to San Diego, California. Its provisions show that special benefits to the Government were intended to be secured by it. The statute of incorporation (16 Stats., 573) and the amendatory

act (17 Stats., 59) appear among the "Public acts" of the United States in the publication of the statutes recognized as official by Section 908 of the Revised Statutes. There can be no question but that the statute of incorporation is a public act.

That the Federal Courts take judicial notice of the public acts of Congress or "the law of the land" is a matter of everyday occurrence.

"In like manner the law of nations and the general statutes and general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations" (Greenleaf on Ev., Sec. 5).

This Court has held that a treaty with a foreign power is a law of the land under the Constitution, of which, as a public act, the Courts of the United States will take judicial notice. In the *Head Money cases, 112 U. S., 579*, Mr. Justice MILLER said:

"The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that this 'constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land.' A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

See, also, *U. S. vs. Rauscher, 119 U. S., 407, 418.*

So, also, a proclamation of the President is held to be a public act of which all Courts of the United States are bound to take notice.

Armstrong vs. U. S., 13 Wall., 154.

This Court evidently took notice of the statutes involved in the *Skottowe* case, for it considered their effect in the opinion rendered in that case (162 U. S., 496).

We therefore urge that, inasmuch as The Texas Pacific Railway Company is the creature of a public act of the Congress of the United States, having no powers except those conferred by that act, and inasmuch as the Federal Courts are bound to take judicial notice of public acts, the allegation of the petition or complaint in this case is a sufficient allegation of the federal character of the corporation.

This contention is not contrary to the decision in the *Skottowe* case, nor do we seek a revision of the ruling therein made. We respectfully submit that such ruling does not apply to the case now before the Court.

If the observation made by this Court in the *Skottowe* case (quoted *ante*, p. 12), which we respectfully submit was not necessary to the disposition of the case, is to be applied without modification to all corporations created by and organized under Federal law only, the right recognized in *Osborne vs. Bank* and *The Pacific Railroad Removal cases* will be nullified and rendered valueless, and such corporations may thus be deprived of a valuable right based on the very source of their existence; and this may be done by any individual plaintiff at his will, by mere neglect or refusal to allege the authority by which they are incorporated, or, as in this case, by an actually false allegation of the source of incorporation.

More than that, the jurisdiction of the Federal Courts, so jealously guarded by statute law and by the decisions of the Courts, will be placed at the disposal of such a plaintiff and be subject to his ill-will or caprice.

II.

The Circuit Court of Appeals erred in affirming the charge of the Judge at the trial that a person attempting to cross a railroad track has "a right to expect" that the signals required by law will be given. This point was saved by the second assignment of error.

The statement of the court in its charge that a person attempting to cross a railroad track has the "right to expect" that the company will give the signals required by law presents a radically erroneous view of the law; and it is not cured by the subsequent statement in the charge that plaintiff was required to use due care to avoid danger while attempting to cross defendant's track, for the charge given involves the idea that in measuring the care required of the traveler, the jury shall consider that he has a right to regulate his conduct upon the assumption that the company will, as its train approaches the crossing, give the statutory signals. If this be not the meaning of the language of which we complain, what is its signification? Unless the jury should be guided by the language as a starting point in determining the relative rights and duties of plaintiff and defendant, why was it employed? We submit that it must have been intended as a guide to the jury for the purpose we have indicated; and we also submit that is is fairly susceptible of the construction we have placed upon it and of no other. In the case of *Elliott vs. Railway Co., 150 U. S., 245*, it is said:

"Such omission on his part (to look for cars) has been again and again, both as to travelers on the highway, and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom."

In the case of *Mo. Pac. Ry. Co. vs. Moseley, 6 U. S. C. C. A., 645*, the court observes :

"It is said that if the bell had been rung the plaintiff would have heard it and have avoided the danger and that he had a right to rely upon the expectation that the defendant would comply with the ordinance and ring the bell, and therefore he should be permitted to recover. This position is untenable."

In the case of *McGrath vs. Ry. Co., 59 N. Y., 472*, we find the following :

"But it has been held in several cases that a traveler on the highway is not justified in omitting to look and listen for approaching trains at railroad crossings because the company omit to ring the bell, or sound the whistle. His duty is to keep his faculties alert and look and listen, and does not at all depend upon the fact whether the railroad company does or does not perform its duty in giving the statutory signals. * * * The rule established in this state requires a traveler to look before he crosses a railroad track, for approaching trains, and he is not excused from the charge of negligence if he omits it and injury results from such omission. He cannot be allowed to say that he was misled by trusting to other appearances, and was thereby excused from using the most obvious and easy means of ascertaining the truth. The existence of the track is a warning of danger."

And in the Mosely case cited, *supra*, it is said :

"Every railroad track is a constant warning of danger from the powerful machines that traverse it."

The authorities we have cited most unmistakably

show that, the track being a warning of peril, he who approaches it must be vigilant and cautious. To say to a man that he may rely upon another's providing for his safety in a position of peril is to invite a relaxation of care on his part; and it must be so understood by him and by all to whom the doctrine is announced. The effect, therefore, of the court's charge upon the minds of the jury must have been prejudicial to defendant in that it conveyed to them the thought that, in view of the assumption upon which plaintiff was authorized to proceed, remissness on his part, if he heard no signals, or, at least, if no signals were given, should not be weighed against him. In its last analysis, the position of the court infringes the rule that the plaintiff in actions of this sort must exercise due care to protect himself, and must, in the development of his case, establish the use of such care by him as a condition precedent to recovery; and it results in a confusion that magnifies the defendant's fault and minimizes the plaintiff's. Indeed, it does more; in respect to a vital point it leaves room to exculpate the plaintiff and inculpate the defendant respecting a matter as to which they should, to say the least, be on an equal footing. In *Railroad Co. vs. Houston, 95 U. S., 702*, the court says:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to look and listen before attempting to cross the railroad track in order to avoid an approaching train, and not to walk carelessly into a place of possible danger."

Referring to the duty of a traveler approaching a crossing, Mr. Beach says:

"He must assume that there is danger and act with ordinary prudence and circumspection on that assumption."

Beach on Con. Neg., Sec. 63.

That it was necessary for plaintiff to establish as a prerequisite to a recovery the use of care by him in endeavoring to cross the track is shown by the case of *G. C. & S. F. Ry. Co. vs. Albright, 26 S. W. Rep. (Tex. C. C. A.), 250*, and *Incker vs. Ry. Co., 124 N. Y., 308*, as well as by numerous other authorities that might be cited.

III.

Plaintiff was guilty of contributory negligence in not exercising due care when he approached the track of the Railway Company. This exception was the subject of the Fourth and Fifth assignments of Error.

The only evidence relating to the manner in which plaintiff approached the crossing was that of the plaintiff himself, and it is as follows:

"I could hear no train but could see lights away ahead of me at the mill, and I knew I was at the power house, and that I was near the railroad. I heard no train; there was no electric light there at all; in fact, no light at all. There was no whistle blown, because if there had been I should surely have heard it; neither was there any bell rung. I was on the eastern sidewalk, walking directly across the track where there would have been a sidewalk if it was not for the railroad or switch stand; the stand is directly in the side of the crossing where the sidewalk should be. As I

passed over this track [marked 'A' on the stenographer's map], I was struck and knocked down and felt my foot caught in some way at the time. I was struck where the switch stand and track come together" (Rec., p. 17).

Again:

"As to whether, in approaching that road, I listened for any noise of the railroad train, I will say there is a noise men can hear all hours of the day and night. Cameron's mill is there and makes a terrible noise. The power house on the same side of the street makes a terrible noise. Cameron's mill is here [witness points to place marked 'B' on stenographer's map]. Cameron's mill is on the north side of the track and west of the street; the power house is south of the track and on the west side of the street" (Rec., p. 17).

Again:

"To the question, what did you do, if anything, while approaching the crossing of the T. & P. Ry. over Jennings Avenue in the City of Fort Worth, Texas, tell with reference to listening? he answered: As I approached the crossing I will say, I did not come to a dead stop, but slacked my pace and walked slow and listened and looked and I neard no train and could see none. There was no light at the crossing. If there had been any light on the train that run over me I know I would have seen it. I am certain there was no light on said train. The bell was not ringing nor was the whistle blown for the crossing by the parties on the engine which ran over me" (Rec., p. 18).

Again, on same page:

"When I approached the crossing I knew where I was."

The fourth assignment of error proceeds upon the assumption that it devolves upon the plaintiff in a case of this character to show that he was in the exercise of

reasonable prudence in approaching and attempting to pass over a railroad crossing. From the case of Tucker vs. Ry. Co., 124 N. Y., 308, cited *supra*, we take the following extract:

"The law requires a traveler, before crossing a railroad track on a public highway, to look and listen for the approach of trains. If he omits to do so, and suffers injury while crossing, he cannot recover because of such omission. That which it is his duty to do, he, or, in case of his death, his representative, must, in an action for damages sustained, prove was done, or at least must prove facts from which inference can reasonably be drawn that he performed his duty in that respect. It will not be presumed that he looked; it must be proven."

In the case of Cincinnati, etc., Ry. Co. vs. Henard, 124 Ind., 120, it is said:

"He must show the facts, as well those which relate to his share in the transaction as those which relate to the defendant's, and if upon the whole case the inference of negligence arises against the defendant and of due care on his part he may recover. The fact that a person traveling on a highway comes in collision with a train on a railway crossing is of itself sufficient to suggest a presumption of contributory negligence against him in suit for compensation."

The first three clauses of the fourth assignment all assert the duty of the traveler to stop and look and listen before he ventures on the crossing. The first announces separately the duty to stop. The second, while asserting the duty to stop, look and listen, announces separately the duty to look both ways. The third, while affirming the duty of stopping, looking and listening, presents distinctively the necessity for so doing at such distance from the track as may be necessary to ascertain the approach of the train.

It is the duty of the approaching traveler to stop. It certainly is if the following authorities are to be accepted as the law : Cincinnati, etc., Ry. Co. vs. Henard, 124 Ind., 120 ; Aiken vs. Ry. Co., 130 Penn. St. Rep., 380 ; Mo. Pac. Ry. Co. vs. Mosley, 6 U. S. C. C. A., 645. From the Aiken case we take the following extract :

" It is not a rule of evidence but a rule of law, peremptory, absolute and unbending, and the jury can never be permitted to ignore it, to evade it or to pare it away by distinctions and exceptions. That failure to stop is not merely evidence of negligence but negligence *per se*, has been said so often that to cite cases would be wearisome."

From the Henard case, the following :

" It is the rule that a person before crossing a railroad track must stop, look and listen, and it applies to pedestrians as well as to others."

From the Mosely case, the following :

" It is the duty of such a traveler to stop and look and listen before he crosses a single track."

The reason for the requirement of stopping is happily expressed in the Aiken case in the following language :

" The stopping is an essential part of the rule to enforce attention to the accompanying duties of looking and listening, and to secure their performance in something more than a perfunctory and heedless way."

As appears from the foregoing statement of the plaintiff's testimony he did not stop before going on the crossing. Was it the duty of plaintiff to look both ways ? It surely was if the following quotation from the Moseley case states the rule correctly :

"The traveler on the public highway, who, without looking both ways and listening for the coming locomotive, steps upon the railroad track and is injured, is guilty of contributory negligence that bars his recovery, even though the railroad company may have been negligent."

In section 64, Beach on Contributory Negligence, we find:

"In attempting to cross, the traveler must listen for signals, notice signs put up for warnings and look attentively up and down the track."

At what distance from the crossing must the traveler stop and look and listen? Let the following language used in the case of Salter vs. Ry. Co., 75 N. Y., 273, answer:

"In the case considered, if the deceased looked, it was so near the track that it was too late to avoid the danger. That he failed to do so before and in season to avoid the collision was clearly negligent."

Suppose that the requirement of stopping goes further than is defensible, still there cannot be any possible question that the traveler is under the necessity of looking and listening in view of the Houston case, 95 U. S., 161, and the Scholfield case, 114 U. S., 615, both of which expressly and forcibly lay down those duties. We seriously insist that the duty of stopping is equally reasonable and imperative. Let us, however, discard it and consider merely the obligation to look and listen. If our contention that it is incumbent upon the plaintiff to prove that he approached the crossing cautiously be sound, and we think it unanswerable, fortified as it is by reason and authority, and if our position that the traveler must look both ways and that he must look and listen in season to avoid injury be tenable, and we do it unassailable, supported

as it is by reason and authority, did not the plaintiff Cody fall short of what was necessary when, though himself possessing a peculiar and exclusive knowledge of his own conduct, he gave not a syllable of testimony showing in what direction he looked or showing where he was when he looked and listened.

The fourth clause of the Fourth assignment of error presents the affirmative proposition that plaintiff is shown by the evidence to have failed to exercise due care in approaching the crossing. All that plaintiff did on the occasion is set forth in the foregoing extracts from his testimony. Charles Mealey, a witness for plaintiff, testifies that he was about 150 feet from plaintiff at the corner of Burton, Lingo & Co.'s lumber yard when he heard plaintiff scream at crossing (Tr., p. 23). Inspection of the stenographer's map (Tr., p. 39) shows that the place designated by Mealey, as the point where he was when he heard the scream and which is marked "G" on the map, is on the same side of the street on which plaintiff shows that he was when injured and south of the place of injury. The evidence of the witnesses and the map shows that the railroad track crosses Jennings avenue, the street on which plaintiff claims to have been hurt, at right angles the avenue running north and south and the track east and west. Mealy further testified:

"That the whole train passed over Jennings avenue going west, the engine passing just as witness got there; that the engine had a headlight pointed east which threw a light down the track; that a man standing on the crossing could have seen where the headlight threw the light east; that witness when at Burton, Lingo & Co.'s could see down the track east of the

crossing and he saw the lanterns of the switchmen, though how far they were he could not tell, swing backward and forward down in the yard, but he could not see the switchmen" (Tr., p. 24).

Thus, according to the testimony of plaintiff's own witness, it is reasonably manifest that had plaintiff been as vigilant as he ought to have been he would have seen the light radiated from the headlight down the track, though, as his witness states, the headlight pointed east, and that he would have seen the displaying of their lights down in the yard by the switchmen.

The fifth assignment of error complains of the error of the court in refusing to give a proper charge in reference to the duties of plaintiff to stop, look and listen as he neared the crossing. That it was incumbent upon plaintiff to do these things we have already endeavored to show. Should the court have given an instruction specifically indicating the necessity for his observing the precautions mentioned? We think so. The charge of the court deals in generalities which could not aid the jury, unlearned in the law, as they must be presumed to have been. To tell men not lawyers that a man must use "due care" or that he should use "reasonable diligence," or that "the care to be exercised is such that an ordinary prudent man would exercise under the circumstances," all of which expressions occur in the charge given, is to leave them practically without a guide. Such formulas define nothing, elucidate nothing. Peculiarly pertinent is the following language taken from Livingston vs. Maryland Ins. Co., 7 Crouch, 544:

"And if, in point of law, plaintiffs were entitled to such directions, the court erred in their refusal, although the direction, afterwards given by the court, might by inference and argument, in the opinion of the court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inferences. It would be a dangerous practice and tend to mislead instead of enlightening a jury."

The case of T. & P. Ry. Co. vs. Martin, Wise & Fitzhugh, recently decided, is valuable upon the subject as to the duty of the court in applying the charge to the very facts of the case (S. W. Rep., Vol. 27, p.).

IV.

The railway company was not negligent in respect to the lighting of the street at the crossing over its track.

It may be said that, though there was strong evidence showing that the crossing was lighted at the time plaintiff was injured, still that there being evidence that it was not lighted and the jury having passed on the issue, the verdict should not be disturbed. Concede that this is correct as to the point of the light's burning when plaintiff was hurt, we nevertheless think that, upon the question as to the exercise of due care by defendant to provide a light at the crossing, only one fair conclusion can be drawn from the evidence. J. C. Lord, witness for defendant, testified by deposition taken June 9, 1892:

"That he is now and has been for three and a half years superintendent of the Ft. Worth Light and Power Company, said company having been engaged during that period in furnishing electric light and gas and power to the public generally in Fort Worth at any and all points demanded; that since about the middle of May, 1891, until and including the present time, said Fort Worth Light and Power Company has been furnishing, under an agreement, the Texas & Pacific Railway Company with electric light by means of an electric arc light suspended by a wire about 25 feet above the ground at the middle of the crossing, at the place where the Texas & Pacific Railway track is crossed by Jennings avenue in Ft. Worth, the agreement not being for any particular length of time, but having been all the time in effect, and being to furnish electric light of 2,000 candle power, to be supplied every night during the year from sunset to sunrise; that since the making of said agreement until the present time the Light and Power Company has thereunder each and every night furnished an electric light at said crossing from sunset to sunrise, and that on the night of March 2nd, 1892, said light was furnished at said crossing; that by agreement between the Light and Power Company and the Railway Company said light should be paid for monthly, on the 4th and 5th of each month for the next preceding, and it has been paid for during all of said time pursuant to agreement" (Tr., p. 33).

Upon cross-examination witness J. C. Lord testified:

"That the Fort Worth Light and Power Company did not, to his knowledge, have any trouble with the light at Jennings avenue crossing about March 4th, 1892; that all lights are subject to disturbances and sometimes go out, and that his company keeps a man on duty until 10 o'clock at night to answer all complaints on that account, that being the time they most frequently occur; that he does not know that the Jennings avenue light had been in the habit of going out or giving trouble about that time; that no one ever complained to him of the insufficiency or uncertainty of the light at said crossing during the early spring of 1892, and he did not know of any cause or reason existing to render that light uncertain during the month of March, 1892; that witness does not mean by his answer

to direct interrogatories that the Light and Power Company's engines, dynamos and other apparatus were in good order on the night in question, and that said company was furnishing electric lights to the people of Fort Worth in general on that night, he having no positive knowledge of the state of this particular light at the time" (Tr., pp. 53, 54).

Intended to countervail this testimony is that of D. West, who says that the arc light was not erected at said crossing until after this accident (Tr., p. 35). We have no doubt that the testimony of Mr. Lord is far the more reliable on account of his peculiar position and on account of the necessity of his familiarity with the matter. That for ten months prior to the accident the Texas and Pacific Railway Company should, at the end of each month pay a bill for electric lights furnished during the month, when not only had the light not been supplied, but the structure for furnishing it had not been put up, is incredible in the last degree. On account of his position at the time the following testimony of C. B. McCafferty, defendant's witness, is extremely valuable upon the issue as to the light:

"That it was at that period the duty of the witness to preserve a record of lights, to look after them and see that they were burning; that if at any time one was out it was his duty to telephone to headquarters so that it could be adjusted; that he kept the record of the lights in a book, which he always kept, his system being to note date and time of night when he discovered a light out, and to make no notation if the light was burning; that he has the book with him, and that it shows no entry for that night, and that he made no record of that night" (Tr., p. 31).

Preceding testimony of McCafferty shows that he was at that time employed as a watchman by defendant in its yards, including Jennings avenue crossing, and that his testimony relates to the condition of the lights within

his territory, and that he spoke with especial reference to said crossing (Tr., p. 30).

V.

Plaintiff was a trespasser when injured.

By the sixth clause of the fourth assignment of error we claim that it was proved that the plaintiff was not injured at the crossing, but at a place on the railway company's private grounds, where he had no lawful right to be.

While there is a sharp conflict of evidence relating to the place where the accident happened, yet there is one feature of the matter to which we regard it as important to direct the attention of the court. Defendant's witnesses, Whilley and Sullivan, who were employees of defendant on the train at the time it ran over plaintiff, testify that he was run over at a place in the private yards of defendant from 150 to 175 feet east of Jennings avenue crossing (Tr., pp. 25–30). By plaintiff and his witness Mealey this is flatly contradicted, their statement being that he was run over at the crossing, and another witness of plaintiff, E. E. Miller, mentions circumstances going to show that plaintiff was hurt at the crossing (Tr., pp. 21, 22). It being certain that very soon after plaintiff was injured he was lying east of the crossing, fixed by plaintiff's witness McGraw at about 30 or 40 feet therefrom (Tr., p. 35), and by his witness Judkins at about 75 feet therefrom (Tr., p. 25). Plaintiff and his witness Mealey, to account for that fact, state that the train

men, immediately after the train passed, picked plaintiff up and carried him to a place east of the crossing (Tr., pp. 22, 23). Defendant's witnesses Whilley and Sullivan say that Cody was not removed from the place where he was struck except to be lifted up and placed on a cushion, a distance of about two feet (Tr., pp. 25, 27). We submit that the evidence of plaintiff's witnesses concerning this feature of the case is highly incredible. Considering that men act only from motives, it presupposes as its basis that the trainmen, in the excitement engendered by running over a man and crushing his leg, were cool and self-possessed; and not only that, but that, common laborers as they were, they were informed in the law to such an extent as to enable them to distinguish between the effect as to liability of running over a man at a public crossing and the effect of running over him on the private grounds of the company. And not only must they have been lawyers, but must have been so unscrupulous as to undertake to suppress facts. And is it not strange that the suppression would have been attempted in the presence of two witnesses, one, at least, of whom had the strongest motive to expose the fraud? Right here we ask a perusal of the testimony of plaintiff's witness Miller, found on pages 31 and 32 of the Record. His version of the manner in which he became acquainted with the fact—while lying in bed at night—that Cody had been hurt, is stranger than fiction, if it is true.

VI.

The rights of railway companies at crossings are superior to those of passengers on the highway.

The sixth assignment of error excepts to the action of the trial Court in refusing special charge No. 7, asked by defendant, and which is as follows:

"You are instructed that the rights of the railroad company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings.

In support of this position we refer the court to Warner vs. Ry. Co., 44 N. Y., 465.

VII.

The trial Court erred in its charge to the jury as to the amount of damages.

By the third assignment of error exception is taken to the charge of the court wherein it instructed the jury that

"if they found for plaintiff they would find for him in any sum not to exceed $10,000.00, in this, that said charge prescribed no measure of damages, but leaves their assessment to the unbridled discretion of the jury."

From Vol. 2, Sec. 2060, Thompson on Trials, we quote:

"The measure or proper elements of his damages are also questions for the court; that is, it is the duty of the judge to state to the jury the rules of law which are to govern them in estimating the damages in the particular case. * * * When there is an established rule of law as to the measure of damages applicable to a particular case, it is extremely important that the judge should inform the jury what the rule is; for to leave the jury without any definite rule to guide them will manifestly lead to injustice. A failure so to direct the jury is ground for a new trial; and this has been held even where the specific instruction was not asked." See also G. C. & S. F. Ry. Co. vs. Head, 15 S. W. Rep., 504 (Tex. App. Cases).

In view of the foregoing errors we submit that the judgment of the Circuit Court of Appeals should be reversed.

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For the Railway Company.

FILED.
MAR 27 1897
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 246.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

versus

HENRY D. CODY, DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

Plaintiff below sued for damages suffered by him, as the result of the fact that he was run over by one of the trains of the defendant Company, "near to, about, at and on the place" where its track crosses Jennings Avenue, in Fort Worth, in the State of Texas.

The damages consisted in the crushing of his right leg in such a manner as to necessitate its amputation, and in the bruising and laceration of his head and body.

The damages are alleged to have been due to the negligence of defendant Company, which, on a very dark night,

ran its engine and cars at a greater rate of speed than six miles per hour, failed to ring the bell, or blow the whistle, or carry any light or lights on the end of the cars approaching plaintiff, and also failed to maintain lights at the crossing and on the cars, or to maintain any flagman or watchman at the crossing.

Defendant in error alleges special damages exceeding $900, and claims $20,000 in the aggregate. (See Plaintiff's First Amended Original Petition, which, under the Texas practice, takes the place of and supersedes the original petition. R. pp. 7 *et seq.*)

Defendant's First Amended Original Answer, which, under the Texas practice, takes the place of and supersedes the original answer (R. pp. 11 *et seq.*), consists of a general demurrer; an exception to the petition, for that it fails to apprise defendant whether the injuries complained of were inflicted on or away from a crossing; and pleas: (1) that the injuries were due solely to plaintiff's own negligence in trespassing on defendant's railway at a place devoted exclusively to its private use; (2) that the injuries were due solely to plaintiff's negligence in failing to look and listen; (3) that the plaintiff should not recover, because, even if defendant was guilty of negligence, plaintiff was guilty of contributory negligence in failing to look and listen, at a place where and a time when, if he had looked and listened, he would not have been injured.

The case was duly tried in the Circuit Court and verdict and judgment rendered in favor of plaintiff for $7500. Defendant took the case by writ of error to the Circuit Court of Appeals, which affirmed the judgment of the

Circuit Court, whereupon defendant took a writ of error to this Court. (R. pp. 12, 13, 46, 49, 50).

On the trial the plaintiff gave evidence tending to show that, on March 4th, 1892, on a very dark night, he was walking along Jennings Avenue, in Fort Worth, and towards the track of the T. & P. Railway, which he approached from the south. The track of said railway here runs along a street, whose name does not appear in the record, and crosses Jennings Avenue at right angles. When he approached the crossing he slacked his pace, walked slowly, listened, looked, heard no train and saw none; there was no light on the crossing, no bell ringing, no blowing of a whistle, and no light indicative of the approach of the train. As he passed over the track, he was struck and knocked down, and so severely injured, that his leg had to be amputated. (See evidence of plaintiff and of his witnesses, R. pp. 16 *et seq.*)

ARGUMENT.

We do not propose to analyze the testimony nor to weigh it. Suffice it to say, that the jury, whose province it was so to do, did weigh the evidence, which was conflicting, and found as above. It is, of course, elementary that whether there is any evidence is a question of law. But in applying this rule the plaintiff in error seeks to substitute the judgment of the Judge that there is not sufficient evidence for his judgment that there is no evidence.

We say that there was plenty of evidence tending to prove the facts above set forth, and the verdict of the jury has practically found them as the facts of this case. The defendant excepted to the charge of the Judge in several

particulars, as also to certain refusals to charge, all of which exceptions were made the subject matter of fourteen assignments of error filed in the Circuit Court, all of which were overruled by the Court of Appeals, and the judgment of the Circuit Court affirmed. (See opinion and decree of Circuit Court of Appeals, R. pp. 46 and 51).

The assignments of error have been reduced in this Court to six in number which, however, cover the same ground as thirteen out of the fourteen assignments submitted to the Court of Appeals.

The fourteenth assignment presented to the Court of Appeals, which alleged error in the refusal of the Circuit Court to grant a new trial, is very properly abandoned here, as the jurisprudence of the Federal Courts is well settled that the ruling of the lower court upon a motion for a new trial is not subject to review.

We now take up the six assignments in succession, identifying each one with the corresponding assignment or assignments in the Court of Appeals.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas.

This assignment, if really intented as a separate and substantive one, is clearly too broad and general to receive any consideration by this Court.

See Rule 21.

Van Stone vs. Stillwell and Bierce Mfg. Co., 142 U. S. 133.

Grand Trunk Ry. Co. vs. Ives, 144 U. S. 415.

We therefore pass on to the other assignments.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in that portion of its general charge "wherein it instructed the jury that a person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, in this, that it presents an erroneous view of the law which requires that the traveler, upon approaching a railroad crossing, shall be on the alert and stop and look and listen to ascertain whether, if he ventures on the crossing, his life or limb may be imperiled by a train that may be nearing the crossing at the same time."

This is the same as the first assignment of errors in the Court of Appeals.

If the portion of the charge of the trial Judge, referred to in this assignment, constituted the whole of the charge of the Court, it might possibly be objected to, as it gives the measure of care required of the defendant, and says nothing about the care required of the plaintiff; but we claim that the charge given by the Court, taken as a whole, gives the correct measure of care required of both parties, and that although it failed to use the language requested by the defendants, it gave the law to the jury substantially and correctly. We most emphatically deny that there is any decision of any Court holding that the use of the expression, "that it is the duty of a traveler, upon approaching a railway track, to look and listen," is sacramental, in a charge, in a personal damage case. That the terms suggested by the defendant are a correct exposition of a part of the law, may be true, but we deny that they are the only

terms which can be used to correctly express the idea intended to be conveyed.

This exact point has been decided by your Honors in an opinion rendered at the same term, and reported in the same volume, in which the *Houston* case, which announced the "look and listen" doctrine, is reported.

In the case of *Continental Improvement Company vs. Stead, 95 U. S. 162*, Mr. Justice Bradley rendered the decision referred to, which is so apposite to this case, that we quote from it very freely:

"The case, as appears by the bill of exceptions, was substantially as follows: The collision occurred in a cut about five feet in depth, in which the wagon road crossed the railroad on a level therewith, nearly at right angles, descending to it on each side by an excavation. The train was a special one, coming from the North, and did not stop at the station, which was four hundred or five hundred feet North of the crossing, and none of the regular trains were due at that time, although special trains were occasionally run over the road. The plaintiff was going East, away from the village, following another wagon, and in approaching the railroad track could not see a train coming from the North, by reason of the cut and intervening obstructions. There was evidence tending to show that the plaintiff, though he looked to the southward (from which direction the next regular train was to come), did not look northwardly; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired; and that he did not stop before attempting to cross the track; also, evidence tending to show that the engineer in charge of the train used all efforts in his power to stop it after he saw the plaintiff's wagon on the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed the train was running at the time, some witnesses testifying that it was at

an unusual and improper rate, and others the contrary. *The counsel for the railroad company requested the Court to adopt certain specific instructions, to the general effect that the plaintiff should have looked out for the train and was chargeable with negligence in not having done so;*

* * * * * *

and that it is the duty of those crossing the railroad to listen and look both ways along the railroad before going on it, and to ascertain whether a train is approaching or not. (Italics ours). The Judge refused to adopt the instructions framed by counsel, but charged, in effect, as follows: That both parties were bound to exercise such care as, under ordinary circumstances, would avoid danger; such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended upon the risk of danger; that, where the view was obstructed so that parties crossing the railroad could not see an approaching train, the exercise of greater care and caution was required on both sides; as well on the part of those having the management of the train as of those crossing the railroad; that the former should approach the crossing at a less rate of speed, and use increased diligence to give warning of their approach; and, if the train was a special one, it was still more incumbent upon them in going through such a place to slacken their speed and sound the whistle and ring the bell, than if the train were running on regular time; and, on the other hand, that the party crossing with a team should proceed with more caution and circumspection than if the crossing were in an open country, and not venture upon the track without ascertaining that no train was approaching, or at least without using the means that common prudence would dictate to ascertain such fact; but that, if a train were not a regular one, no train being due at the time, the same degree of caution would not be expected on his part, as if it were a regular train and on usual time. In short, the Judge charged that the obligations, rights and duties of railroads and travelers upon highways, crossing them, are mutual and reciprocal, and

no greater degree of care is required of the one than of the other. He further charged, that the plaintiff should not have a verdict unless the persons in charge of the train were guilty of negligence or want of due care, and unless the plaintiff himself were free from any negligence or carelessness which contributed to the injury. The evidence of the case was fairly submitted to the jury in the light of the principles thus announced.

"This is the general scope of the charge; and we think it is in accordance with well settled law and with good sense. If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and right-of-way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad

track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity—entirely inconsistent with the care and prudence which is required of them,—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortune. These propositions are so indisputable, that they need no reference to authorities to support them. We think the Judge was perfectly right, therefore, in holding that the obligations, rights and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. *The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. The charge of the Judge was in substantial accordance with these views.* (Italics ours).

"The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies can-

not expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads.

"Perhaps some of the abstract propositions of the defendant's counsel contained in the instructions asked for, based on the facts assumed therein, if such facts were conceded, or found in a special verdict, would be technically correct. But a judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical answers to a judicial catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts; and if a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial. But when he explains the whole law applicable to the case in hand, as we think was done in this case, he cannot be called upon to express it in the categorical form, based upon assumed facts, which counsel choose to present to him. See *Neils vs. Smith, 8 Wall. 27; Nudd vs. Burrows, 91 U. S. 426.*"

The Judge of the Circuit Court in his charge did exactly what the Judge whose charge was complained of in the above case did, to-wit: He refused to use the language suggested by counsel for defendant, used his own lauguage and expressed his viws of the obligations of the parties at the crossing in substantially the same language as that adopted by the Judge who charged the jury in the Continental Improvement Company case.

We deem it best to here copy the charge of the learned Judge *a quo* to show the correctness of this statement (see R. pp. 37 *et seq.*):

"2d—If you believe from the evidence that plaintiff was injured on defendant's track east of Jennings Avenue, then you will find for the defendant.

"3d—If, however, the jury find from the evidence that the plaintiff was injured by the defendant on its track on the crossing of Jennings Avenue, in Fort Worth, then you are instructed that the Statutes of the State of Texas provide 'that each locomotive engine shall have on it a bell or a steam whistle, and that the bell shall be rung or the whistle blown at a distance of at least 80 rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped.'

"4th—The plaintiff, if he was injured on Jennings Avenue while attempting to cross defendant's track was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger; should he not do so, and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train.

"5th—Should you believe from the evidence that the plaintiff knew, or by the use of reasonable diligence might have known, of the approach of defendant's train, and thereby have avoided the danger, then you will find for the defendant.

"6th—If, on the other hand, you believe from the evidence that the plaintiff's negligence was not the proximate cause of his injuries, and that the plaintiff, without fault on his part, was injured by defendant at Jennings Avenue crossing, through want of proper care on the part of the defendant, then you will find for plaintiff, in any sum not to exceed $10,000.

"A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect

on the part of the road results in his injury, then he cannot recover.

"7th—The degree of care that was proper care on the part of the plaintiff and defendant must fit and grow out of the time, the occasion and circumstances. If the night was dark and misty and no arc light or other light lit up the crossing at Jennings Avenue, then to the extent that such facts, if at all, increased the danger at the crossing of Jennings Avenue, then to that extent was greater care and prudence required of both plaintiff and defendant at said crossing.

"8th—The care to be exercised is such as an ordinary prudent man would exercise under similar circumstances. This is the true rule whether applied to the alleged negligence of the railroad company or the alleged contributory negligence of the plaintiff, and what is due care under a given state of facts, must be determined by the jury by applying the rule as to what, in their judgment, a man of ordinary prudence would have done under the circumstances shown by the evidence.

"9th—If plaintiff was injured at the crossing of Jennings Avenue over defendant's track, and his failure to use the care that a person of ordinary prudence would have used under the circumstances, was the proximate cause of his injuries, then he cannot recover, although defendant may have also been guilty of negligence in the matter of failing to ring the bell on the engine, or in some other matter."

The decision from which we have quoted above at so great length seems to us all the authority which it is necessary to cite in this case, and we shall not trouble the Court with a long list of decisions.

We refer, however, to *Grand Trunk Ry. Co. vs. Ives, 144 U. S. 433*, in which case the plaintiff in error complained of a refusal of the trial Judge to give a charge which, as that Judge said, "dwelt too much upon the weight of cer-

tain evidence, and confines the jury to the particular circumstances narrated without notice of others that they may think important." Your Honors said:

"This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider *all* the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all others."

This language applies to the charge of the trial Judge in the case at the bar, and to the criticisms of that charge, with the same force that it did in the Ives case.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in that portion of its general charge, "wherein it instructed the jury that if they found for plaintiff, they would find for him in any sum not to exceed $10,000, in this, that said charge prescribed no measure of damages, but leaves their assessment to the unbridled discretion of the jury."

This is identical with the second assignment presented to the Court of Appeals.

It complains of the failure of the Judge to charge the jury as to the measure of damages.

Even if it be conceded that there is error in the charge in this respect, which we do not concede, still it is clear that both the assignment and the bill of exceptions upon which it is founded are bad, because of the failure of the defendant to indicate and ask for the appropriate suppletory instructions.

Express Co. vs. Kountze Bros., 8 Wall. 353.

Carter vs. Carusi, 112 U. S. 484.

T. & P. Ry. Co. vs. Volk, 151 U. S. 78.

In the last-named case the subject is fully discussed.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in holding that it committed no error in refusing to give Special Charge No. 1, asked by plaintiff in error, which is as follows: "Defendant asks the Court to instruct the jury to return a verdict in this case for defendant."

1. Because the plaintiff failed to prove that he stopped upon approaching the crossing to ascertain whether a train was also approaching, he at the time knowing the fact that he was at the crossing.

2. Because the plaintiff failed to prove that he looked both ways upon approaching the crossing to ascertain whether a train was also approaching the crossing, he at the time knowing the fact that he was at the crossing.

3. Because the plaintiff failed to prove that he either stopped, looked or listened, upon approaching said crossing, at such distance therefrom as would be necessary to ascertain if a train was also approaching said crossing at the same time, he at the time knowing the fact that he was at the crossing.

4. Because it was proved by the evidence that plaintiff failed upon approaching the crossing to exercise the care that a man of ordinary prudence would use under the circumstances, and that such failure of care on his part caused or contributed proximately to the production of the injuries he received.

5. Because a fair preponderance of the evidence showed that defendant was not negligent in respect to lighting the crossing,

but that it used due care to have said crossing lighted, and that it was actually lighted when plaintiff was injured.

6. Because a fair preponderance of the evidence showed that plaintiff was not injured at the crossing, but at a place on defendant's private grounds, where he had no lawful right to be, and where defendant's trains and employees had the exclusive right to be.

7. Because a fair preponderance of the evidence showed that the defendant's employees in charge of the engine were ringing the bell on approaching the crossing, and therefore defendant was not negligent in that respect.

8. Because a fair preponderance of the evidence showed that on the tank of defendant's engine there was a headlight which was burning at the time, and therefore defendant was not negligent in that respect.

9. Because a fair preponderance of the evidence showed that plaintiff was injured when he was intoxicated, and on account of his being intoxicated.

This assignment corresponds to nine assignments, numbered from 3 to 11, inclusive, presented to the Court of Appeals.

Each of the sub-assignments, and all of the exceptions upon which it is based, depends upon the proposition that the Circuit Court, the Court of Appeals and this Court should usurp the functions of the jury and take away from it a case where the evidence was conflicting, and a "fair preponderance" of that evidence was in favor of the plaintiff and not of the defendant.

All the assignments assume that the plaintiff failed to prove that he looked and listened as he approached the crossing, and failed to show that he exercised due care; and

that the defendant proved due care upon its part, and negligence upon the part of the plaintiff.

The evidence of the plaintiff himself (Rec. p. 18, near top) is specific, that when he approached the crossing he did not come to a dead stop, but "slacked his speed, walked slow, listened and looked, heard no train, and could see none;" that there was no light at the crossing, nor any upon the train; that the bell was not ringing, nor was the whistle blown.

The plaintiff further testified (Rec. p. 17, near bottom) that there is a terrific noise at the crossing at all hours, due to the presence of Cameron's Mill and of the power house in the vicinity of the crossing.

Abundant testimony is offered to show the darkness of the crossing on the night in question, and also the fact that it was habitually left in darkness by the Company.

Under these circumstances, on a very dark night, in a very noisy neighborhood, the defendant Company backed (testimony of defendant's engineer, J. S. Whilley, a witness for defendant, Rec. p. 26, near top) one of its trains across the crossing, without the slightest regard to human life or limb.

It is impossible that this Court should take such a case as this from the jury, and we assert and believe that, under the circumstances disclosed by the "fair preponderance" of evidence in this case, it was the duty of the defendant Company, if it desired to operate its trains in the way that it did, to have had flagmen to warn passengers of their approach.

To our mind, the negligence of the defendant is clear,

and there is not even a scintilla of proof of the want of care on the part of the plaintiff.

We, therefore, dismiss this assignment and its nine sub-assignments.

V.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court for the Northern District of Texas, and holding that it committed no error in refusing to give Special Charge No. 3, requested by plaintiff in error, which is as follows:

"You are instructed that it was the duty of the plaintiff, upon approaching the railroad track on Jennings Avenue crossing, to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing; and if you believe, from the evidence, that he failed to stop and look and listen, and that in consequence of such failure he was injured, you will find for the defendant, even though you should believe from the evidence that the defendant was negligent, either in respect to not furnishing a light at said crossing, or in respect to not giving signals of the approach of the train, or in respect to both of such matters; because said charge states the law and is applicable to this case, as the evidence failed to show that plaintiff either stopped or looked both ways on approaching the crossing, and that if he had stopped and looked both ways he would have discovered the presence of the train on the track."

The general charge of the Court fully covered this request, and the refusal of the Judge to charge in the *ipsissima verba* of counsel is substantially the same ruling assigned as error in the *Continental Improvement Company* case, but held by this Court not to constitute error. See especially the first of the portions of the decision italicized in our quotation, *supra*.

VI.

The Circuit Court of Appeals erred in its judgment affirm-

ing the judgment of the Circuit Court for the Northern District of Texas, in refusing to give Special Charge No. 7, requested by the plaintiff in error, which is as follows:

"You are instructed that the rights of a railroad company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings."

Because it states the law, and was called for by the facts of the case.

The general charge also fully covered this point. This assignment of error is also specifically answered by your Honors in the *Continental Improvement Company* case, and especially in the second of the portions of the decision italicized by us in our quotation, *supra*.

We respectfully submit that none of the assignments of error are well taken, and that the judgment of the lower court was correct and should be affirmed, and we pray that it be so affirmed, with ten per cent. damages for delay.

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